EDITOR'S NOTE

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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

IN RE ANGEL FRANCISCO BREARD

Petitioner.

APPENDIX TO PETITION FOR A WRIT OF HABEAS CORPUS

Imminent Execution Scheduled
April 14, 1998

Alexander H. Slaughter (VSB#05916)
(Counsel of Record)
William G. Broaddus (VSB#05284)
Dorothy C. Young (VSB#31155)
McGuire, Woods, Battle & Boothe LLP
One James Center, 901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000

Michele J. Brace (VSB# 36748)
Virginia Capital Representation
Resource Center
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-6845

Counsel for Petitioner
Angel Francisco Breard

157 pp

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANGEL FRANCISCO BREARD,
Petitioner-Appellant,

v.

SAMUEL V. PRUETT, Warden,
Mecklenburg Correctional Center,
Respondent-Appellee.

THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION,
Amicus Curiae.

No. 96-25

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-96-366-3)

Argued: October 1, 1997

Decided: January 22, 1998

Before HAMILTON and WILLIAMS, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Williams joined. Senior Judge Butzner wrote a concurring opinion.

COUNSEL

ARGUED: William Gray Broaddus, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellant. Donald

Richard Curry, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. ON BRIEF: Alexander H. Slaughter, Dorothy C. Young, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia; Michele J. Brace, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellant. Jeffrey L. Bleich, San Francisco, California, for Amicus Curiae.

OPINION

HAMILTON, Circuit Judge:

Following a jury trial in the Circuit Court for Arlington County, Virginia, Angel Francisco Breard, a citizen of both Argentina and Paraguay, was convicted and sentenced to death for the murder of Ruth Dickie. He now appeals the district court's denial of his petition for writ of habeas corpus. *See* 28 U.S.C. § 2254. We affirm.

I

In February 1992, Ruth Dickie resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County, Virginia. At about 10:30 or 10:45 p.m. on February 17, 1992, Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, Isch called Joseph King, the maintenance person for the apartment complex. Upon arriving at Dickie's apartment, King knocked on the door and heard a noise that sounded like someone was being dragged across the floor. After receiving no response to his knocking, King called the police.

When the police arrived, they entered Dickie's apartment with a master key that King provided. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread. She was bleeding and did not appear to be breathing. The police observed body fluid on Dickie's pubic hair and on her inner thigh. Hairs were found clutched

in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. A telephone receiver located near her head was covered with blood.

An autopsy revealed that Dickie had sustained five stab wounds to the neck; two of which would have caused her death. Foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to hair samples taken from Breard. Hairs found clutched in Dickie's hands were Caucasian hairs microscopically similar to Dickie's own head hair and bore evidence that they had been pulled from her head by the roots. Semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects, and his DNA profile matched the DNA profile of the semen found on Dickie's body.

Breard was indicted on charges of attempted rape and capital murder. Following a jury trial, he was convicted of both charges. The jury fixed Breard's punishment for the attempted rape at ten years' imprisonment and a $100,000 fine. In the bifurcated proceeding, the jury heard evidence in aggravation and mitigation of the capital murder charge. Based upon findings of Breard's future dangerousness and the vileness of the crime, the jury fixed Breard's sentence at death. The trial court sentenced Breard in accordance with the jury's verdicts.

Breard appealed his convictions and sentences to the Supreme Court of Virginia, and that court affirmed. *See Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994). On October 31, 1994, the United States Supreme Court denied Breard's petition for a writ of certiorari. *See Breard v. Virginia*, 513 U.S. 971 (1994).

On May 1, 1995, Breard sought state collateral relief in the Circuit Court for Arlington County by filing a petition for writ of habeas corpus. On June 29, 1995, the circuit court dismissed the petition. On January 17, 1996, the Supreme Court of Virginia refused Breard's petition for appeal.

Breard then sought federal collateral relief in the United States District Court for the Eastern District of Virginia by filing a petition for writ of habeas corpus on August 30, 1996. On November 27, 1996, the district court denied relief. *See Breard v. Netherland*, 949 F. Supp.

1255 (E.D. Va. 1996). On December 24, 1996, Breard filed a timely notice of appeal. On April 7, 1997, the district court granted Breard's application for a certificate of appealability as to all issues raised by Breard in his application. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22.

II

A

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended, among other things, 28 U.S.C. § 2244 and §§ 2253-2255, which are parts of the Chapter 153 provisions that govern all habeas proceedings in federal courts. The AEDPA, which became effective on April 24, 1996, also created a new Chapter 154, applicable to habeas proceedings against a state in capital cases. The new Chapter 154 applies, however, only if a state "opts in" by establishing certain mechanisms for the appointment and compensation of competent counsel. In *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), the Supreme Court held that § 107(c) of the AEDPA, which explicitly made new Chapter 154 applicable to cases pending on the effective date of the AEDPA, created a "negative implication . . . that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.* at 2068. Thus, under *Lindh*, if a habeas petition was filed before April 24, 1996, the pre-AEDPA habeas standards apply. *See Howard v. Moore*, 1997 WL 755428, at *1 (4th Cir. Dec. 9, 1997) (*en banc*) ("Howard filed his habeas petition in the district court prior to April 26, 1996, the effective date of the AEDPA. We, therefore, review Howard's claims under pre-AEDPA law." (footnote omitted)). For habeas petitions filed after April 24, 1996, then, the Chapter 153 provisions apply, *see Murphy v. Netherland*, 116 F.3d 97, 99-100 & n.1 (4th Cir. 1997) (applying amended § 2253 in case where state prisoner filed federal habeas petition after the effective date of the AEDPA), and the Chapter 154 provisions apply if the state satisfies the "opt-in" provisions.

Breard filed his federal habeas petition on August 30, 1996. Accordingly, the Chapter 153 provisions apply. *See Howard*, 1997 WL 755428, at *1. With respect to the Chapter 154 provisions, the district court held that they did not apply because the Commonwealth

of Virginia did not satisfy the "opt-in" provisions of the AEDPA. *See Breard v. Netherland*, 949 F. Supp. at 1262. Because the Commonwealth of Virginia has not appealed this ruling and the record is not developed on this point, we decline to address whether the Commonwealth of Virginia's mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfies the "opt-in" provisions of the AEDPA. *Cf. Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (declining to decide whether the procedures established by the Commonwealth of Virginia for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfy the "opt-in" requirements, which would render those provisions applicable to indigent Virginia prisoners seeking federal habeas relief from capital sentences if an initial state habeas petition was filed after July 1, 1992), *cert. denied*, 117 S. Ct. 503 (1996). However, we are confident that the "opt-in" provisions are of no help to Breard.

B

Initially, Breard contends that his convictions and sentences should be vacated because, at the time of his arrest, the Arlington County authorities failed to notify him that, as a foreign national, he had the right to contact the Consulate of Argentina or the Consulate of Paraguay pursuant to the Vienna Convention on Consular Relations, *see* 21 U.S.T. 77. The Commonwealth of Virginia argues that Breard did not raise his Vienna Convention claim in state court and thus failed to exhaust available state remedies. Furthermore, because Virginia law would now bar this claim, the Commonwealth of Virginia argues that Breard has procedurally defaulted this claim for purposes of federal habeas review. The district court held that, because Breard had never raised this claim in state court, the claim was procedurally defaulted and that Breard failed to establish cause to excuse the default. *See Breard v. Netherland*, 949 F. Supp. at 1263. Breard's failure to raise this issue in state court brings into play the principles of exhaustion and procedural default.

In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *See Matthews v.*

Evatt, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997); *see also* 28 U.S.C. § 2254(b). To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court. *See Matthews*, 105 F.3d at 911. The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition. *See id.* The burden of proving that a claim is exhausted lies with the habeas petitioner. *See Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1.

Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir.) (internal quotes omitted), *cert. denied*, 117 S. Ct. 630 (1996); Va. Code Ann. § 8.01-654(B)(2) ("No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."). Breard contends that he had no reasonable basis for raising his Vienna Convention claim until April 1996 when the Fifth Circuit decided *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.), *cert. denied*, 117 S. Ct. 487 (1996). In that case, the court held that an arrestee's rights under the Vienna Convention were violated when Texas officials failed to inform the arrestee of his right to contact the Canadian Consulate. *Id.* at 520. Breard further maintains that he could not have raised his Vienna Convention claim in his state habeas petition because the Commonwealth of Virginia failed to advise him of his rights under the Vienna Convention. These allegations, however, are inadequate to demon-

strate that the facts upon which Breard bases his Vienna Convention claim were unavailable to him when he filed his state habeas petition.

In *Murphy*, we rejected a state habeas petitioner's contention that the novelty of a Vienna Convention claim and the state's failure to advise the petitioner of his rights under the Vienna Convention could constitute cause for the failure to raise the claim in state court. *See* 116 F.3d at 100. In reaching this conclusion, we noted that a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant and that in previous cases claims under the Vienna Convention have been raised:

> The Vienna Convention, which is codified at 21 U.S.T. 77, has been in effect since 1969, and a reasonably diligent search by Murphy's counsel, who was retained shortly after Murphy's arrest and who represented Murphy throughout the state court proceedings, would have revealed the existence and applicability (if any) of the Vienna Convention. Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national. Counsel in other cases, both before and since Murphy's state proceedings, apparently had and have had no difficulty whatsoever learning of the Convention. *See, e.g., Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993); *Mami v. Van Zandt*, No. 89 Civ. 0554, 1989 WL 52308 (S.D.N.Y. May 9, 1989); *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979); *United States v. Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979).

Id.

Murphy forecloses any argument that Breard could not have raised his Vienna Convention claim at the time he filed his initial state habeas petition in May 1995. Accordingly, Breard's Vienna Convention claim would be procedurally defaulted if he attempted to raise it in state court at this time. Having reached this conclusion, we can only address Breard's defaulted Vienna Convention claim if he "can demonstrate cause for the default and actual prejudice as a result of

the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In order to demonstrate "cause" for the default, Breard must establish "that some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court at the appropriate time. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Murphy*, 116 F.3d at 100 (applying *Murray* and finding that petitioner failed to establish cause to excuse the default of his Vienna Convention claim). For the same reasons discussed above, Breard asserts that the factual basis for his Vienna Convention claim was unavailable to him at the time he filed his state habeas petition and, therefore, he has established cause. But, under *Murphy*, Breard's showing is insufficient to allow this court to conclude that the factual basis for his Vienna Convention claim was unavailable. Consequently, there is no cause for the procedural default. Accordingly, we do not discuss the issue of prejudice. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995) (noting that once court finds the absence of cause, court should not consider the issue of prejudice to avoid reaching alternative holdings), *cert. denied*, 116 S. Ct. 1575 (1996).

Finally, we find it unnecessary to address the issue of whether the AEDPA abrogated the "miscarriage of justice" exception to the procedural default doctrine. Assuming *arguendo* that the AEDPA has not eliminated the miscarriage of justice exception articulated in *Murray*, 477 U.S. at 495-96 (miscarriage of justice exception available to those who are actually innocent), and *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992) (miscarriage of justice exception available to those who are actually innocent of the death penalty, *i.e.*, those habeas petitioners who prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty), no miscarriage of justice occurred here. In no set of circumstances has Breard made a showing that he is actually innocent of the offense he committed, *see Murray*, 477 U.S. at 495-96, or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty, *see Sawyer*, 505 U.S. at 350. Accordingly, Breard is entitled to no relief on his Vienna Convention claim.

C

Breard also contends that his death sentence violates *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny. In asserting this claim, Breard argues that: (1) given the prosecutor's alleged offer to forego the death penalty if Breard would plead guilty, the prosecutor violated his constitutional rights by seeking and obtaining a death sentence once Breard insisted upon pleading not guilty; (2) the Commonwealth of Virginia imposes the death penalty arbitrarily in capital murder cases; and (3) his death sentence is unconstitutionally disproportionate. The first two claims mentioned above were never raised in state court. The remaining claim was raised on direct appeal, but only as a state law claim, and on the appeal from the denial of state habeas relief the Virginia Supreme Court found this claim procedurally barred under the rule of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974) (holding that issues not properly raised on direct appeal will not be considered on state collateral review). Because Breard has not established cause for the obvious procedural default of these claims or that a miscarriage of justice would result by our failure to consider any one of these claims, we cannot address the merits.

D

Finally, Breard argues that the aggravating circumstances instructions given by the trial court are unconstitutionally vague. This claim is not procedurally barred because the Supreme Court of Virginia rejected it on direct appeal. *See Breard v. Commonwealth*, 445 S.E.2d at 675. In his brief, Breard concedes that we have upheld similar instructions in the recent cases of *Bennett*, 92 F.3d at 1345 (rejecting vagueness challenge to the Commonwealth of Virginia's vileness aggravating circumstance), and *Spencer v. Murray*, 5 F.3d 758, 764-65 (4th Cir. 1993) (rejecting vagueness attack on the future dangerousness aggravator). Furthermore, Breard states that he is raising this claim on appeal only "to preserve this claim for future review should such be necessary." *See* Petitioner's Br. at 37. As a panel of this court, we are bound by *Bennett* and *Spencer*, *see Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996) (one panel of this court may not overrule another panel's decision); therefore, we must reject Breard's attack on the constitutionality of the aggravating circumstances instructions given by the trial court.

III

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

BUTZNER, Senior Circuit Judge, concurring:

I concur in the denial of the relief requested by Angel Francisco Breard. I write separately to emphasize the importance of the Vienna Convention.

I

The Vienna Convention facilitates "friendly relations among nations, irrespective of their differing constitutional and social systems." The Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 78, 79 (*ratified by the United States* Nov. 12, 1969). Article 36, provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> • • •
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended. *Id.* at 101.

II

The Vienna Convention is a self executing treaty—it provides rights to individuals rather than merely setting out the obligations of signatories. *See Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (assuming the same). The text emphasizes that the right of consular notice and assistance is the citizen's. The language is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government.

The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states. *See Head Money Cases*, 112 U.S. 580, 598-99 (1884). The Supremacy Clause mandates that rights conferred by a treaty be honored by the states. United States Const. art. VI, cl. 2. The provisions of the Convention should be implemented before trial when they can be appropriately addressed. Collateral review is too limited to afford an adequate remedy.

III

The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world—

as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity . . . ." *Hilton v. Guyot*, 159 U.S. 113, 228 (1895).

The State Department has advised the states, including Virginia, of their obligation to inform foreign nationals of their rights under the Vienna Convention. It has advised states to facilitate consular access to foreign detainees. Prosecutors and defense attorneys alike should be aware of the rights conferred by the treaty and their responsibilities under it. The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ANGEL BREARD

Petitioner,

v.

J.D. NETHERLAND, WARDEN

Respondent.

Civil Action Number 3:96CV366

FINAL ORDER

This matter is before the Court on respondent's motion to dismiss the petition for a writ of habeas corpus. For the reasons set forth in the accompanying Memorandum Opinion, the Court GRANTS the motion. The petition is DISMISSED WITH PREJUDICE.

It is so ORDERED.

Let the Clerk send a copy of Order and accompanying Memorandum Opinion to all counsel of record.

NOV 27 1996
DATE

Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

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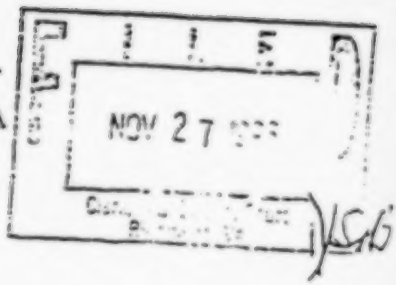
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division



ANGEL BREARD

Petitioner,

v.

Civil Action Number 3:96CV366

J.D. NETHERLAND, WARDEN

Respondent.

MEMORANDUM OPINION

This matter is before the Court on respondent's motion to dismiss the petition for a writ of habeas corpus. For the reasons set forth below, the Court GRANTS the motion.

I. Background

Mr. Breard was convicted of the rape and stabbing death of thirty-nine year old Ruth Dickie. The Virginia Supreme Court, affirming Breard's conviction and sentence on direct appeal, stated the facts of the case as follows:

> In February 1992, the victim, Ruth Dickie, resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County. She was 39 years of age and unmarried. Breard was living in an apartment a short distance from Dickie's apartment.
>
> About 10:00 or 10:15 p.m. on February 17, 1992, Dickie left an Arlington restaurant. About 10:30 or 10:45 p.m., Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. Isch heard Dickie say, "[K]eep your hands off me." According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, when everything became quiet, Isch called the apartment complex maintenance man.

Upon receiving a call, the maintenance man, Joseph King, went to Dickie's apartment. King knocked on the apartment door and heard "something that sounded like something being drug across the floor." After receiving no response in his knocking, King called the police.

When the police arrived, King gave them a master key. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread wide. She was bleeding profusely and did not appear to be breathing.

The police observed a "shiny . . . dried . . . body fluid" on Dickie's pubic hair and on her inner thigh. Hairs were found clutched in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. The police found Dickie's eyeglasses, without one lens, in the living room, and the missing lens was found under her body. A telephone receiver located near her head was covered with blood. In the room where Dickie's body was found, the police also found her shoes and her pants with some buttons missing. Dickie's purse was on the floor just inside the front door, and her set of keys was on the floor between her legs.

An autopsy revealed that Dickie had sustained five stab wounds to the neck. Two of the wounds would have caused her death.

The body fluid found on Dickie's pubic hair and inner thigh was subjected to a serological examination and identified as semen. No semen was detected on vaginal or anal swabs.

In the course of their investigation, the police obtained a sample of Breard's blood and samples of his head and pubic hair. The hair samples were subjected to microscopic examination, and the blood sample was subjected to enzyme testing and DNA analysis.

The foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to the hair samples taken from Breard. The hairs found clutched in Dickie's hand were Caucasian hairs "microscopically like" Dickie's own head hair and bore evidence that they had been pulled from her head by the roots.

The semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects. On all five of the genetic probes used in the DNA testing, Breard's DNA profile matched the DNA profile of the semen found on Dickie's body.

Breard is a native of Argentina, and his DNA profile occurs in only one in seventeen million members of the Hispanic population. Only 1.7% of the general population has Breard's enzyme typing.

> At trial, Breard testified in his own defense. He stated that, on the night of February 17, 1992, he left his apartment armed with a knife because he thought he would "try to do someone," meaning that he "wanted to use the knife to force a woman to have sex with [him]." Breard admitted that he engaged Dickie in conversation on the street, followed her to her apartment, argued with her, and forced himself into her apartment. Breard also admitted that he stabbed Dickie, removed her pants, and got "on top of her." While he was on Dickie, he heard someone knocking on the door. He "got scared," opened a kitchen window, jumped to the ground and fled. Breard also testified that, at the time, he believed that he was under a curse placed upon him by his ex-wife's father.

Breard v. Commonwealth, 248 Va. 68, 72-73, 445 S.E.2d 670, 673-74 (1994).

II. Procedural History

Petitioner was indicted for attempted rape and for the capital offense of murder in the commission of, or subsequent to, rape or attempted rape. After a jury trial, he was found guilty on June 24, 1993. The jury sentenced Mr. Breard to ten years and a $100,000 fine for the rape and sentenced him to death for the capital murder. On August 22, 1993, the trial court conducted a sentencing hearing and entered an order reflecting the jury's verdict. Petitioner's execution date was set for February 17, 1994. The execution was stayed pending appeals.

The Supreme Court of Virginia affirmed the judgment on June 10, 1994. *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994). On October 31, 1994, the United States Supreme Court denied Breard's petition for a writ of certiorari. *Breard v. Virginia*, 115 S.Ct. 442 (1994).

The Circuit Court of Arlington County denied Bread's state habeas petition on June 29, 1995. The Supreme Court of Virginia refused his petition for appeal on January 17, 1996, and denied his petition for rehearing on March 1, 1996.

On April 25, 1996, Petitioner filed a motion in this Court for appointment of counsel and stay of execution. The Court granted the motion and directed Breard to file his petition by July 1, 1996.

III. Claims Presented

Petitioner attacks his conviction and sentence on the following grounds:[1]

I. Authorities of the Commonwealth of Virginia violated Petitioner's rights under the Vienna Convention.

II. Petitioner was incompetent to stand trial because his fanatical religious beliefs and incomprehension of the American justice system made him incapable of assisting in his own defense.

III. Virginia permits the death penalty to be arbitrarily imposed and it was arbitrarily imposed in this case.

- A. The Commonwealth arbitrarily sought the death penalty.
- B. The Commonwealth arbitrarily imposes the death penalty in capital rape-murder cases.
- C. Imposition of the death penalty on petitioner is not proportional to the penalty in other capital rape-murder cases.

IV. The Supreme Court of Virginia's statutorily required review denied Petitioner due process and was constitutionally inadequate to prevent Virginia's arbitrary imposition of the death penalty on Petitioner.

V. Application of Virginia's statutory aggravators results in capricious and arbitrary imposition of the death penalty.

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[1]The claims are taken verbatim from Mr. Breard's petition.

A. Virginia's "vileness" factor is unconstitutionally vague and fails to permit the jury to distinguish meaningfully and rationally the few for whom death may be an appropriate sentence from the many for whom it is not, in violation of the Due Process Clause of the Fourteenth Amendment and the prohibition against cruel and unusual punishment under the Eighth Amendment.

B. The future dangerousness aggravator was unconstitutionally applied here because the statutory language is confusing and because the jury was permitted to utilize evidence of unadjudicated acts of misconduct to sentence Petitioner to death without any requirement or instruction that it could not utilize such acts unless the jury found that such acts were established by some standard of proof such as proof beyond a reasonable doubt.

VI. The trial court improperly refused to strike a prospective juror in violation of the right to an impartial jury.

VII. The court improperly allowed the prosecutor to ask expert witnesses if they had been retained by defense counsel and to state in closing argument that experts had been hired by defense counsel.

VIII. The Petitioner was denied reasonably effective assistance of counsel.

A. Counsel failed to raise the issue of the Vienna Convection and state habeas counsel failed to raise it in the state habeas corpus petition.

B. Counsel failed to have Petitioner evaluated as to competency at the time of trial, and state habeas counsel failed to raise this issue in the state habeas corpus petition.

C. Counsel failed to perform an adequate mitigation investigation.

D. Counsel improperly gave the prosector notice of use of expert testimony on Petitioner's insanity.

E. Counsel failed to timely request a mistrial based on the prejudicial testimony of Florence Dickie.

IX. The sentence of death was imposed under the influence of passion, prejudice or other arbitrary factors and/or was excessive or disproportionate to the penalty imposed in similar cases.

X. The cumulative prejudice suffered by Breard because of the multiple violations of his rights requires reversal of his conviction and/or death sentence.[2]

IV. Standard of Review

Before addressing Petitioner's claims, the Court must consider the applicability of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. This Act, which became effective on April 24, 1996, makes significant changes to the law of federal habeas corpus review. The relevant amendments are organized in two chapters. Chapter 153 provides procedures for habeas review. Newly enacted Chapter 154 provides special procedures for expedited review in capital cases.

A. Applicability of Chapter 154

In essence, Chapter 154 creates a "quid pro quo arrangement under which States are accorded stronger finality rules on federal habeas corpus review in return for strengthening the right to counsel for indigent capital defendants." *Satcher v. Netherland*, No. 3:95CV261, 1996 WL 596270, mem. op. at 28 (E.D. Va. Oct. 8, 1996) (quoting H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995)). To merit consideration under the special expedited procedures, a state must "opt-in," in other words, the state must satisfy certain prerequisites. As summarized in *Satcher*, those requirements are as follows:

1. The State must establish by statute, rule of its court of last resort, or other agency authorized by state law a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. *See* § 2261(b).
2. Such mechanism must provide standards of competency for the appointment of such counsel. *See* § 2261(b).

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[2] This claim was first advanced as claim B in Breard's Reply Brief.

3. Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. *See* §2261(c).

4. Such mechanism must provide for the entry of a court order either appointing counsel to each indigent capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. *See* §2261(c).

Id. at 17. When Satcher's state habeas proceedings became final on October 3, 1994, Virginia had not satisfied the first, third and fourth "opt-in" requirements. *Satcher* at 28. Breard's state habeas proceedings became final on January 17, 1996. In the interim, VA. CODE ANN §19.2-163.7 was amended. It now mandates appointment of post-conviction counsel for indigent defendants. Respondent insists that this change satisfies the third and fourth criteria.

However, the State has not satisfied the first criteria. Virginia has not established an appropriate mechanism for the appointment and payment of counsel. *Id.* at 19. As Judge Payne stated in *Satcher*, "substantial compliance" with the Act's requirements is not sufficient:

> If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do so; and, instead, Congress chose to confer those benefits only if the States made an affirmative, institutionalized, formal commitment to provide a post-conviction review system which Congress considered to be crucial to ensuring fairness and protecting the constitutional rights of capital litigants.

Id. at 19 (internal quotations omitted). Thus, the Commonwealth is not entitled to the expedited review provided by Chapter 154.

B. Applicability of Chapter 153

In Chapter 153, Congress amended the old habeas statutes. Most federal courts considering the issue have concluded that these amendments are not retroactive. *See, e.g., Boria v. Keane*, 90

F.3d 36, 38 (2nd Cir. 1996) (per curiam); *Edens v. Hannigan*, 87 F.3d 1109, 1111 n.1 (10th Cir. 1966); *Satcher* at 37. *But see Lindh v. Murphy*, 1996 U.S. App. LEXIS 24136 (7th Cir. Sept. 12, 1996). These courts, however, were determining whether the amendments applied to *pending cases*. The effective date of the Act was April 24, 1996. Breard filed his first pleadings before the Court on April 25, 1996. This is one day after the effective date of the new law.

Unless Congress expresses a contrary intent, a statute takes effect on the date of enactment. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Yet, Petitioner insists that, if applied in this case, the Act would have an impermissible retroactive effect. When a statute lacks express Congressional intent as to retroactivity, the Court must determine "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Products*, – U.S. –, 114 S.Ct. 1483, 1499 (1994). This Court will not reach a conclusion regarding the retroactivity of the Act. As discussed below, Petitioner's claims fail under the new standards and would also fail under prior law. *See e.g. Bennett v. Angelone*, 92 F.3d 1336, 1343 (4th Cir. 1996) (omitting any discussion of the new act because the writ fails under the more deferential standards of the old law); *Sherman v. Smith*, 89 F.3d 1134, 1142 n.1 (same).[3]

C. Procedural Default under Chapter 153.

Petitioner argues that procedural default is no longer a bar to federal review under the new law. In essence, he argues that Congress' inclusion of a procedural bar in the newly enacted Chapter 154 evinces Congress' intent to extinguish all procedural bars under Chapter 153. He also notes that

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[3]Also, since Petitioner's claims fail under either standard, this Court need not address Petitioner's argument that the Act offends Article III.

while Congress did include statutory codification of certain judiciary rules, it did not codify the default provisions.

These arguments are specious. Congress' inclusion of a procedural default rule in Chapter 154 is easily explained. In chapter 154, Congress sought to create a new sub-category of procedures for handling habeas petitions in capital cases. The legislature enacted Chapter 154 to accord "stronger finality rules on habeas corpus review" in capital cases. H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995). The broader procedural bar included in Chapter 154 is part of this attempt. This in no way suggests Congress' intent to eviscerate the procedural default rules applicable in all other habeas petitions. Other than additional subparagraph divisions, the language of the old §2254(b) remains largely intact. The Court may confidently assume that Congress would have expressly stated any intent to make such a sweeping change in the law.

V. Exhaustion and Procedural Default

This Court's review of Breard's petition for habeas corpus is restricted to the inquiry of whether his confinement and sentence are in violation of the federal Constitution or laws. 28 U.S.C. § 2241(c)(3). Before reaching the merits of Petitioner's claims, he must demonstrate that he has exhausted all state court remedies. *See Rose v. Lundy*, 455 U.S. 509 (1982). In this case, Petitioner raised several of the present claims in his petition for a writ of habeas corpus before the Virginia Courts. His remaining claims are exhausted because they were never raised in state court and could not be raised in state court now. *See* VA. CODE ANN §§ 801.654(B)(2) and 801.654-1.

Likewise, this Court will not consider claims that are procedurally defaulted. These include claims never presented to a state court. *Gray v. Netherland*, 116 S.Ct. 2074, 2080-81 (1996); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Claims

defaulted under an independent and adequate state procedural rule are within this category as well. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The Court recognizes that a procedural bar or default is not absolute. This Court may consider a procedurally defaulted claim if "the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The Court will address Petitioner's cause and prejudice arguments as they relate to each claim.

Claim I

Virginia's persistent refusal to abide by the Vienna Convention troubles the Court. However, a violation of rights under the Convention is insufficient to permit § 2254 relief. *Murphy v. Netherland*, No. 3:95cv856, Memorandum Opinion at 6-8 (E.D. Va. July 26, 1996). In any event, Petitioner never raised this issue in state court. Therefore, the claim is defaulted and federal review is barred. *Gray*, 116 S.Ct. at 2080-81; *Bassette*, 915 F.2d at 937.

Petitioner argues that the Commonwealth's failure to comply with the Vienna Convention provides just cause for the default. However, the Commonwealth's failure to comply with the Vienna Convention did not prevent Breard's counsel from raising the issue during state proceedings. The only predicate fact required to raise the claim was the knowledge of Breard's foreign nationality. The legal knowledge required to raise the claim is imputed to Breard through the various attorneys who represented him during the trial, direct appeal, and state habeas proceedings. "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of any attorney error." *Coleman*, 501 U.S. at 753 (internal quotations omitted).

Claim II

This is also the first time Petitioner has asserted his incompetency to stand trial. Petitioner insists that his competency to stand trial may never be waived. Early case law supports this view. *Pate v. Robinson*, 383 U.S. 375, 384 (1966); *Kibert v. Peyton*, 383 F.2d 566, 569 (4th Cir. 1967). However, in *Townes v. Murray*, 68 F.3d 840 (4th Cir. 1994) *cert. denied*, --U.S.--, 116 S.Ct. 831 (1996), the Fourth Circuit summarily dismissed a similar competency claim as procedurally barred. Although the Fourth Circuit did not discuss prior case law, *Townes* is dispositive and forecloses any ruling in favor of the Petitioner.

In any event, Breard was competent to stand trial. An individual is incompetent where, at the time of the trial, he did not have "sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding," nor did he have "a rational as well as factual understanding of the proceedings against him." *Cooper v. Oklahoma*, -- U.S. --, 116 S.Ct. 1373, 1377 (1996). In an affidavit signed on June 13, 1995, Breard's trial counsel stated the following:

> We also investigated the possibility of an insanity defense and succeeded in persuading the trial court to appoint three experts who examined and evaluated Breard. All of the experts, however, concluded that Breard was sane. *Throughout our contact with Breard, moreover, it was clear that Breard was articulate, bright and competent to stand trial. We had no difficulty communicating with Breard. None of the expert evaluators had given any indication that Breard was incompetent to stand trial.*

(Respondent's Ex. I at ¶ 4, emphasis added). Before reaching this conclusion, trial counsel consulted three separate experts. Counsel was entitled to rely upon information provided by defense experts. *Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir.) (counsel is not required to second-guess the experts appointed to assist the defense), *cert. denied*, 510 U.S. 984 (1993).

Yet, Petitioner's federal habeas counsel argues that Breard's "religious fanaticism and belief in the satanic curse, in conjunction with his fundamental misconception of the North American legal system, deprived Petitioner of any rational understanding of the proceedings against him." (Petitioner's Brief at 27). This does not show Breard's incompetence to stand trial. Rather, it is an attempt to embroil the Court in an analysis of the appropriateness of certain religious and cultural beliefs. Such an analysis is inappropriate and unnecessary. Although the record suggest that Petitioner often declined counsel's advice, nothing suggest that he was unable to give his attorneys needed information or was unable to comprehend the trial.

Claims IIIA and IIIB

These claims were not presented to the state courts and the Court will not consider them at this juncture. *Gray* at 2080-81; *Bassette*, 915 F.2d at 937. On direct appeal, Breard argued that the jury imposed the death penalty under the influence of passion prejudice or other arbitrary factors. (Petitioner's Appellate Brief before the Supreme Court of Virginia 3, 43, 45). In particular, he argued that the death penalty was arbitrarily *imposed* in *his* case. In the present petition, Breard claims that the Commonwealth arbitrarily *sought* the death penalty (Claim IIIA) and that the Commonwealth arbitrarily imposes the death penalty in *all* capital rape-murder cases (Claim IIIB). While acknowledging the differences in these arguments, Petitioner insists that "a broad conclusory allegation [is] sufficient to save the claim" from procedural default. (Petitioner's Reply Brief at 31). This is not the law. Recent Supreme Court opinions have emphasized that claims must be "fairly presented" to the state courts. *See, e.g., Duncan v. Henry*, -- U.S. -- 115 S.Ct. 887 (1994) (per curiam) (holding that exhaustion of a similar claim is insufficient to satisfy the "fairly presented"

standard); *Gray*, 116 S.Ct. at 2081 ("[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to the state court").

Claims IIIC and IX

In claim IIIC Breard argues that the "imposition of the death penalty on Petitioner is not proportional to the penalty in other capital rape-murder cases." Similarly, in Claim IX he states that "the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factors and/or was excessive or disproportionate to the penalty imposed in similar cases." The Virginia Supreme Court held both claims defaulted under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975); VA. CODE ANN § 8.01-654(B)(2). Under *Slayton*, state habeas review is barred by the failure to raise an issue at trial or on direct appeal. *Slayton* is a well recognized bar to federal review. *Spencer v. Murray*, 18 F.3d 229, 232 (4th Cir. 1994).

Breard argues that the Supreme Court of Virginia erred in applying the *Slayton* bar. In Petitioner's Appellate brief, he listed facts sufficient to support both claims. However, the brief makes no reference to either state or federal law. VA. CODE ANN §17-110.1 also provides certain proportionality guarantees in capital cases. Under state law, the Supreme Court of Virginia must determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Breard v. Commonwealth, 248 Va 68, 88, 445 S.E.2d 670, 681-82 (1994). The Supreme Court of Virginia specifically referenced this statute when it reviewed Breard's claims. *Id.* The application

of *Slayton* confirms that the Virginia Supreme Court, in the absence of any guidance from Petitioner, considered only the state law aspects of petitioner's claims.

In light of this, the Court may not arbitrarily declare that the claims presented below were federal in nature. The controlling case is *Duncan v. Henry*, -- U.S. -- 115 S.Ct. 887 (1994) (per curiam), where the Supreme Court ruled that a federal habeas petitioner must expressly assert a federal constitutional claim in the state courts to preserve it for federal review. The assertion of a similar state claim does not suffice. *Id.* Accordingly, these claims are dismissed.

Claim VII

The Virginia Supreme Court held that this claim was defaulted under the rule of *Slayton*. Because Petitioner does not challenge the procedural bar, the claim is dismissed without further discussion.

Claims VIIIA & VIII

Because they were never raised in state court, these claims are barred. *Gray*, 116 S.Ct. at 2080-81. Breard attempts to overcome the bar by arguing that he had a right to effective assistance of counsel during his state habeas proceedings. Although this is not the general rule, the Supreme Court arguably left room for such an exception in *Coleman*:

> [C]ounsel's ineffectiveness will constitute cause only if it is an independent constitutional violation. *Finley* and *Giarrantano* established that there is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, there must be an exception to the rule of *Finley* and *Giarrantano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question. . . .

501 U.S. at 755. Under Virginia law, Petitioner argues, a trial counsel's ineffective assistance may not be raised on direct appeal. *See Roach v. Commonwealth*, --Va. --, 468 S.E.2d 98, 105-06 n.4

(1996). As a result, the state habeas proceedings provide the first opportunity for raising any ineffective assistance claims. Petitioner argues that every aspect of a criminal conviction must be reviewed at least once and that such review necessarily presupposes competent counsel to handle it.

New §2254(I) forecloses this argument. Under the amendments, "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." *Id.* The claim is also barred under pre-act law. Both of the circuit courts which have addressed the issue rejected Petitioner's argument. *Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir.) (en banc), *cert. denied*, 116 S.Ct. 36 (1995); *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996); *see also Satcher* at 71-75. The Ninth Circuit rejected the argument because the "exception would swallow the rule" and create "an infinite continuum of litigation in many criminal cases." *Bonin*, 999 F.2d at 429-30. Such a rule would create a Sixth Amendment right to counsel at every stage of the proceedings because each new pleading presents the first opportunity to challenge the ineffectiveness of the prior counsel. Like the other courts which have addressed the issue, this Court is unwillingly to read this right into the Sixth Amendment.

Claim VIIIE

The state habeas judge rejected this claim on the merits. On appeal, the Virginia Supreme Court ruled that the claim was barred by Petitioner's failure to brief or argue the issue as required by Virginia Supreme Court Rule 5:17(c)(4). The Court will not review claims which are defaulted under an independent and adequate state procedural rule. *Coleman*, 501 U.S. at 750.

VI. Claims Addressed on the Merits

Each of Petitioner's claims fails under both the old and new standards governing habeas corpus review. Under prior law, the Court reviewed questions of law and mixed questions of law and fact *de novo*. *Brown v. Allen*, 344 U.S. 433 (1953). Absent several codified exceptions, the state trial court's findings of fact were entitled to a presumption of correctness *Sumner v. Mata*, 449 U.S. 591 (1982) (per curiam).

Under the new statute, a federal court may not grant a writ of habeas based on any claim decided on the merits in state court unless it:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

Claim IV

The Virginia Supreme Court held that this claim was defaulted under the rule of *Slayton*. However, this holding is in error. On direct appeal, Breard argued that:

> [A] defendant's liberty interest in proportionality review is violated by the consideration of only those cases which are reviewed by the Virginia Supreme Court. Thus, the Court does not consider those cases in which the death penalty was not imposed, which prevents the Court from reviewing the types of cases in which death was not the appropriate sentence.
>
> For these reasons, the proportionality review conducted by the Court constitutes a violation of the Defendant's due process rights under the Fourteenth Amendment.

(Appellant's Brief before the Supreme Court of Virginia at 18-20). He presents the same argument in this petition. Therefore, *Slayton* will not bar review in this case. *Sand v. Murray*, 1994 WL 191657, *1 (4th Cir. 1994) (unpublished).

Nonetheless, Breard has failed to raise a cognizable claim. The Fourth Circuit has considered and rejected this argument. In *Peterson v. Murray*, 904 F.2d 882 (4th Cir. 1990), a petitioner argued that his due process and equal protection rights were violated because the Supreme Court of Virginia only compared his case to those in which the death penalty had been imposed. The Fourth Circuit rejected the argument and accepted as dispositive the Virginia Supreme Court's statement that it had reviewed all capital-murder cases. *Id.* at 887; *Spencer v. Murray*, 18 F.2d 237, 239 n.4 (4th Cir. 1994). The Court went on to note that it would not issue a writ based on an error in state law. *Peterson*, 904 F.2d at 887 (citations omitted). Under pre-act law, binding precedent requires the Court to dismiss this claim. Under the new law, the Fourth Circuit's opinions establish that the Virginia Supreme Court's decision is not "contrary to . . . clearly established Federal law." 28 U.S.C. §2254(d). Furthermore, as this Court recently noted, it is impossible to recognize this type of blanket indictment of the Virginia Supreme Court's review procedure in capital cases without running afoul of *Teague* and the new rule doctrine is impossible. *Murphy* at 5.

Claim VA

"It is Breard's contention that the jury instruction recently upheld in *Bennett v. Angelone*, 92 F.3d 1336, 1345 (4th Cir. 1996) is insufficient under previously cited Supreme Court precedent and indeed under Virginia law." (Petitioner's Reply Brief at 40 n.24). Petitioner's claim is without merit and must be dismissed under either standard of review. This Court is bound to apply the law as set forth by the Fourth Circuit.

Claim VB

Regardless of whether the Court relies on pre-Act law or the amended § 2254, Petitioner's claim fails. The Fourth Circuit has repeatedly rejected any contention that Virginia's "future dangerousness" aggravator is unconstitutionally vague. *Spencer v. Murray*, 5 F.3d 758, 764-765 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 208 (1994); *Girarrantano v. Procunier*, 891 F.2d 483, 489-90 (4th Cir. 1989) *cert. denied*, 498 U.S. 881 (1990).

Similarly, this Court has rejected any claim that Virginia's "future dangerousness" factor is unreliable because it may be proved with evidence of unadjudicated crimes. *Pruett v. Thompson*, 771 F.Supp. 1428, 1442-43 (E.D. Va. 1991) (Spencer, J.), *aff'd*, 996 F.2d 1560 (4th Cir.), *cert. denied*, 114 S.Ct. 487 (1993); *see also Richardson v. Johnson*, 864 F.2d 1536, 1541 (11th Cir.) (same), *cert. denied*, 490 U.S. 1114 (1989); *Williams v. Lynaugh*, 814 F.2d 205, 207-08 (5th Cir.) (evidence of "unadjudicated criminal conduct," confirmed by witnesses, is admissible in capital sentencing trial), *cert. denied*, – U.S. – (1987). Consequently, the trial court did not err in refusing to instruct the jury that all alleged prior offenses must be proved beyond a reasonable doubt.

Claim VI

The Sixth Amendment guarantees the right to a fair and impartial jury in every criminal case. *Morgan v. Illinois*, 504 U.S. 710 (1992). When reviewing this issue, a state court's finding that a juror is fair and impartial is entitled to the presumption of correctness. *Wainwright v. Witt*, 469 U.S. 412, 426-30 (1985); *Boggs v. Bair*, 892 F.2d 1193, 1201 (4th Cir. 1989), *cert. denied*, 495 U.S. 940 (1990). Under prior law, the presumption prevails if the state court findings are fairly supported by the record. *Witt*, 469 U.S. at 429. Under newly amended §2254(e)(1), the presumption may be overcome by clear and convincing evidence.

Petitioner argues that Juror Davis should have been excluded from the panel under two theories. First, Juror Davis indicated that she "might" be affected by photographs of the victim and of the crime scene and that this "could" affect her ability to be an impartial juror. Once a juror has indicated bias, a trial judge may not simply accept the juror's promise to be fair and impartial. *Irvin v. Dowd*, 366 U.S. 717 (1961). Here, Ms. Davis stated that she would be an impartial juror (Tr. at 156) and later stated that she would consider the photographs along with and in light of any mitigating evidence (Tr. at 157). On balance, the trial judge found that the juror was "was very intent . . . very honest and serious." The record fairly supports this conclusion.

Second, Petitioner argues that Juror Davis' answers during *voir dire* established that she would base a finding of future dangerousness solely on the fact the defendant was convicted of murder. In particular, Petitioner relies on the following exchange:

Mr. McCue: How many of you believe that any person who commits a murder will probably commit additional criminal acts of violence in the future?

The Juror: I think it's fair

Mr. McCue: Ms. Davis, would that based on that belief, do you believe that the imposition of the death penalty would be the only way to prevent the person from committing further acts of violence?

The Juror: If feel like they can take their hands off the case. You know that's very technical. Depends on how that – what was behind and the reason for that murder.

Mr. McCue: And – and if you determined that that person would probably commit further acts of violence in the future, would you feel that the only way to prevent that would be by the imposition of the death penalty?

The Juror: Yes. If I really felt certain about it.

(Tr. at 154-155).

A juror is not disqualified simply because she harbors a predisposition toward capital punishment. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). However, any juror who would impose the death sentence automatically, without considering the relevant aggravating and mitigating factors, must be excluded for cause. *Morgan v. Illinois*, 504 U.S. at 2232 (1992). In response to further questioning, Ms. Davis unequivocally demonstrated that she was not so inclined:

> Mr. Karp: In looking at the photographs when you got to the penalty phase and deciding the appropriate punishment, would you consider those photographs as evidence along with the other evidence, including the mitigating factors that are going to be presented to the Court in rendering your decision?
>
> Ms. Davis: Yes.
>
> Mr. Karp: And if you found that there -- the person -- the Defendant in this case was dangerous, would you before deciding upon whether death or life was the appropriate penalty, consider all the evidence, including mitigating factors that the Defendant might present?
>
> Ms. Davis: Yes.

(Tr. at 157). In addition, the trial court specifically found that Juror Davis "would consider all the evidence, including that in mitigation, before she decided what would be the appropriate punishment." *Breard v. Commonwealth*, 248 Va. at 79, 445 S.E.2d at 677. In view of the trial court's superior ability to assess juror credibility, the Court holds that the trial judge did not commit constitutional error in allowing Juror Davis to serve.

Claim VIIIC

"A petitioner claiming ineffective assistance of counsel must show that: (1) in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent performance; and (2) there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different." *Bennett*

v. *Angelone*, 92 F.2d 1336, 1349 (4th Cir. 1996) (quoting *Strickland v. Washington*, 466 U.S. 688, 690-94 (1984)). "When examining ineffective assistance claims, however, [the Court] must appreciate the practical limitations and tactical decisions that trial counsel faced." *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir. 1991). "The best course for a federal habeas court is to credit plausible strategic judgments in the trial of a state case." *Id.* at 1364.

Implementing these standards, the Court must hold that trial counsel performed an adequate mitigation investigation. Petitioner charges that his trial counsel "neither performed, nor sought the assistance of a qualified person to perform, an investigation of Petitioner's social, psychological, medical, educational and family history." (Petitioner's Brief at 58). In preparation for the trial, defense counsel retained three mental health experts: (1) a psychiatrist; (2) a clinical psychologist; and (3) and medical neurologist. Although these experts were unable to provide helpful evidence, there is no question that counsel's endeavors were both reasonable and within the range of professional competence.

Petitioner also argues that trial counsel should have hired a mitigation investigator, brought in members of the Catholic Church to explain Petitioner's belief in satanic curses, informed the jury of a childhood incident of child abuse, and provided testimony from additional family members and friends. These arguments are without merit. As to the first, trial counsel requested and the trial court provided monies for a private investigator. Similarly, although trial counsel did not bring in Mr. Breard's childhood bishop or any other bishop from Paraguay, Breard's local religious counselor from the Good News Mission and several friends testified on Breard's behalf. In addition, counsel presented testimony from Breard's mother, who told of his prior sexual abuse. In light of practical limitations inherent in marshaling witnesses from other countries, the Court holds that trial counsel's

performance was objectively reasonable. As a result, Breard's claim must fail under both *de novo* review and the standards set forth in the amendments to §2254.

Claim VIIID

Petitioner's argument that trial counsel improperly gave the prosecution notice of expert testimony is also reviewed under the *Strickland* standard. Under VA. CODE ANN §§ 19.2-264.3:1E and 19.2-168, trial counsel must give written notice, at least twenty-one days in advance, of any intention to present expert evidence on the issues of sanity or mitigation. If counsel does not comply with this requirement, then the trial court may exclude the evidence.

On February 22, 1993, exactly twenty-one days before trial, counsel filed a notice of intent. A medical doctor had already concluded that Breard was sane at the time of the offense. Thus, Petitioner argues trial counsel had no intention of presenting expert testimony when they filed the notice. On the same date, however, counsel filed a motion to have the court appoint additional mental health experts. Trial counsel's strict compliance with VA. CODE ANN §§ 19.2-264.3:1E and 19.2-168 in an effort to preserve Breard's right to present expert testimony was a " plausible strategic judgment" which this court will not second-guess. *Bunch*, 949 F.2d at 1364. Likewise, under the new standard, the Court must hold that Virginia courts' treatment of the claim did not offend clearly established federal law. Accordingly, all of Breard's sub-arguments stemming from this assignment of error are dismissed.

Claim X

Petitioner argues that the whole of the alleged defects is greater than the sum of its parts. The same argument has been rejected by the Fourth Circuit, which the Court follows in dismissing this claim. *See Hoots v. Allsbrook*, 758 F.2d 1214 (4th Cir. 1986).

Conclusion

For the reasons set forth above, the petition is DISMISSED WITH PREJUDICE.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

NOV 27 1996
DATE

Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MARIO BENJAMIN MURPHY

Petitioner,

v.

J.D. NETHERLAND, Warden,

Respondent.

Civil Action Number 3:95CV856

FINAL ORDER

This matter is before the Court on the respondent's motion to dismiss the petition for a writ of habeas corpus. For the reasons stated in the accompanying Memorandum Opinion the respondent's motion to dismiss is GRANTED and the petition for a writ of habeas corpus is DISMISSED. The petitioner's motion of May 24, 1996, and his motion for discovery of May 29, 1996, are DEEMED MOOT.

It is so ORDERED.

Let the Clerk send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

July 26, 1996
DATE

Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MARIO BENJAMIN MURPHY

Petitioner,

v.

J.D. NETHERLAND, Warden,

Respondent.

Civil Action Number 3:95CV856

MEMORANDUM OPINION

This matter is before the Court on the respondent's motion to dismiss the petition for a writ of habeas corpus. For the reasons stated below, the respondent's motion to dismiss is granted and the petition for a writ of habeas corpus is dismissed.

I.

Under the law of habeas corpus, federal review is barred of claims which are defaulted under an independent and adequate state procedural rule. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *Wise v. Williams*, 982 F.2d 142, 143-45 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2940 (1993). In *Coleman*, the petitioner did not file a notice of appeal to the Virginia Supreme Court from the denial of his state petition for habeas corpus within the thirty day period required by Virginia Rule 5:9(a), and his appeal was consequently dismissed by the Virginia Supreme Court. The United States Supreme Court held that this procedural default barred federal review of the claims raised in the defaulted state habeas corpus petition.

In the instant case, while the petitioner filed his notice of appeal in a timely fashion, he filed

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his petition for appeal one day late under Virginia Rules 5:5(a) and 5:17(a), and VA. CODE ANN. § 8.01-671(A). The Virginia Supreme Court dismissed the appeal for failure to comply with its procedural rules, as it had in *Coleman*. The logic of *Coleman*, then, leads inexorably to the conclusion that all claims present in the petitioner's federal habeas corpus petition which were raised in his state habeas corpus petition must be dismissed because he has procedurally defaulted them.

In dismissing such claims, one must consider that the rule enunciated in *Coleman* is not absolute. Federal courts may consider procedurally defaulted claims if "the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986) (cause and prejudice); *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) (fundamental miscarriage of justice standard considered in context of claim of innocence of the death penalty). Thus, on the petitioner's defaulted claims, the Court must consider cause and prejudice arguments advanced by the petitioner before dismissing the claims.

II.

A.

Claims A, B, C, E, and F of the petition were never raised in state court and could not be raised in state court now. *See* VA. CODE. ANN. §§ 8.01-654(B)(2) and -654.1. These claims are therefore exhausted under 28 U.S.C. § 2254(b). However, because Murphy could have raised these claims in state court, as he was aware of their underlying factual basis, but did not, these claims are defaulted and barred from federal review. *Bassette v. Thompson*, 915 F.2d 932, 936-37 (4th Cir. 1990), *cert. denied* 499 U.S. 982 (1991).

Claim D corresponds to Claim IV of Murphy's state habeas petition. Because Murphy could have presented this claim on direct appeal but did not, the state habeas court held that *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), *cert. denied*, 419 U.S. 1108 (1975), barred state habeas relief. *Slayton* is well recognized as an independent and adequate state procedural bar. *See Spencer v. Murray*, 18 F.3d 229, 232 (4th Cir. 1994). Facts inherent in a state court's *Slayton* ruling are presumed correct pursuant to *Barnes v. Thompson*. 58 F.3d 971, 974-75 (4th Cir. 1995). Thus, default under *Slayton* also bars federal habeas corpus relief. *See Coleman*, 501 U.S. at 750, *Spencer*, 18 F.3d at 232. Moreover, because Murphy also failed to make a timely appeal to the Virginia Supreme Court on this state habeas ruling, federal collateral relief again is barred. *See Coleman*, 501 U.S. at 750.

Claims G(i), G(ii), G(iv), and G(vi) of the petition correspond to Claims I(A), I(B), I(D), and I(E) of Murphy's defaulted state habeas corpus petition, and so federal review of these claims is barred under *Coleman*. Claims G(iii), G(v), G(viii), and G(ix) were presented as Claims I(C), I(G), I(B), and I(F) of Murphy's defaulted state habeas corpus petition respectively, but not with the specificity and breadth present in his federal petition. Claim G(vii) was not presented at all in Murphy's state habeas corpus petition. To the extent that these claims were presented in the defaulted state petition, federal review is barred under *Coleman*. To the extent these claims raise claims not brought in Murphy's state petition, they have not been presented to the Virginia state courts. At this juncture, he can no longer present his claims to the Virginia state courts, *see* VA. CODE ANN. §§ 8.01-654(B)(2) and -654.1, so these claims are exhausted under 28 U.S.C. § 2254(b). However, because Murphy could have presented the claims raised in Claims G(iii), G(v), G(vii), G(viii), and G(ix) to the Virginia Supreme Court, as he was aware of their underlying factual

predicate, but failed to do so, he has defaulted the claims before the Virginia courts, and federal review is barred. *See Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Bassette v. Thompson*, 915 F.2d 932, 936-37 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). In such cases, no statement from the state court that the claim is defaulted is necessary. *See Teague*, 489 U.S. at 299 (rule requiring state court to "clearly and expressly" set forth procedural default inapplicable where claim never presented to the state court). Claim G(x) is merely a general reiteration of the ineffective assistance of counsel claims discussed above, and is procedurally barred for the same reasons.

Claims H, I, J, and L never have been raised in state court and could not be raised now, *see* VA. CODE ANN. §§ 8.01-654(B)(2) and -654.1, so they are exhausted under 28 U.S.C. § 2254(b). Because Murphy could have presented the claims raised in Claims H, I, J, and L to the Virginia Supreme Court, but failed to do so, he has defaulted the claims before the Virginia courts, and federal review is barred. *See Teague*, 489 U.S. at 298-99; *Bassette*, 915 F.2d at 936-37. Claim K was raised as Claim III in Murphy's state habeas corpus petition. Because he failed to timely appeal the denial of that petition, Claim K is defaulted under *Coleman*. In addition, Claim K is barred because the state habeas court held it defaulted under the independent and adequate state procedural rule enunciated in *Slayton*. *See Coleman*, 501 U.S. at 750, *Spencer*, 18 F.3d at 232.

In Claim M, Murphy argues that the presence of cameras in the courtroom denied him due process of law and contributed to ineffectiveness of counsel. As noted above, all ineffective assistance of counsel claims are procedurally barred; thus the Court turns solely to the due process question.

Murphy cites no evidence to support his claim that the cameras' presence affected the prosecutor, defense attorney, judge, witnesses or even Murphy himself. Unsupported and

conclusory allegations do not entitle a petitioner to habeas relief or even to an evidentiary hearing. *Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992). Moreover, the state habeas judge found this claim to be defaulted under the rule of *Slayton* because it had not been raised at trial and on appeal, and federal review is barred on that ground. Finally, Murphy's claim is doubly defaulted by his failure to pursue a timely state habeas appeal.

Murphy makes two arguments in Claim N, first that the trial was fundamentally unfair and second that the whole of the alleged constitutional violations is greater than the sum of its parts. The former contention is adequately addressed in the Court's discussion of the other individual claims. The Court specifically rejects the latter contention in habeas cases. *Briley v. Bass*, 584 F. Supp. 807, 845-46 (E.D.Va.), *aff'd* 742 F.2d 155 (4th Cir. 1984); *see also Alexander v. U.S.*, 509 U.S. —, 125 L.Ed.2d 441, 455 (1993) (position is "counterintuitive" in constitutional law claims). In addition, the claim was not raised at the state level and is therefore procedurally barred.

Claim P is a remarkable, blanket indictment of the Virginia Supreme Court and its history of reviewing capital sentences. Once again, Murphy failed to raise the issue on direct appeal and again failed to raise it by appealing the adverse state habeas decision. The rule of *Slayton* therefore applies and the claim is procedurally barred. In addition, relief on this claim would require the creation of a new rule in violation of *Teague*. The claim may be dismissed on either ground.

Murphy has not supported his Claim R assertion of systematic gender discrimination with a showing either of purposeful discrimination or of similarly situated defendants. *Cf. U.S. v. Armstrong*, — U.S. —, 134 L.Ed.2d 687 (May 13, 1996). More to the point, the claim is defaulted under the *Slayton* rule and because Murphy failed to perfect a state habeas appeal. The Court also notes that Murphy's attempt to declare his crime equal to that of Robin Radcliff, who benefitted

from a hung jury at the capital sentencing phase, is unavailing. Although Radcliff was a co-conspirator in the murder plot, it was Murphy - not Radcliff - who wielded a murder weapon and actually took the victim's life; therefore, Radcliff's crime is not substantially similar.

Claim S is that the death penalty is *per se* unconstitutional as cruel and unusual punishment. Again the claim is defaulted under *Slayton*, and in addition the claim is an obvious request for a new rule in violation of *Teague*. The claim may therefore by dismissed under either ground.

B.

Finally, the Court turns to the laconically filed Claim T. In this claim, Murphy argues that the Commonwealth violated the Vienna Convention on Consular Relations when it failed to advise him of a right to contact the Mexican Consul for assistance in his defense. Some discussion of the Convention is necessary due to the sheer novelty of the claim.

The Court first notes that the purpose of the Convention, true to its title, is to protect the function of consular offices and not specifically to protect individual foreign nationals. Accordingly, the preamble to the Convention states:

> *The States parties to the present convention, . . . Believing* that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems, *Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States, . . . [the States] *Have agreed* as follows . . .

United States Treaties and Other International Agreements, Vol. 21, Part 1 at 79, T.I.A.S. 6820, signed April 24, 1963, ratified December 24, 1969. Murphy emphasizes Article 36, which provides in pertinent part:

> *Communication and contact with nationals of the sending state . . .*
> 1. With a view to facilitating the exercise of consular functions relating to nationals

of the sending state:

(a) consular officers shall be free to communicate with nationals of the sending State . . .

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state if arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph . . .

Murphy never requested the aid of the Mexican consul, but now claims, for the first time both by brief and his own affidavit, that he would have welcomed the consul's aid and that he would have elected to serve his sentence in Mexico if possible.

Section 2254 permits relief only if the Court were to find that Murphy is in custody in violation of the Constitution or of the laws or treaties of the United States. This is that rare case where a treaty, and not solely the Constitution, is implicated. Murphy has attempted to show prejudice by stating, via affidavit, that he would have requested and received aid from his consulate for the purpose of obtaining mitigating evidence from Mexico. Murphy also states that the Commonwealth's violation of the Convention is intentional and continuing.

The Court does not condone what appears to be Virginia's defiant and continuing disregard for the Vienna Convention. However, the Court finds that no violation here would permit § 2254 relief. As the Fifth Circuit held in the similar death penalty review of *Faulder v. Johnson*, the Court finds no reason to believe the alleged violation prejudiced Murphy's case. 81 F.3d 515, 520 (5th Cir. 1996). In *Faulder*, the Fifth Circuit noted that the evidence that would have been obtained by consular officials of the Canadian defendant's home country would have been cumulative or irrelevant, and that the defendant had been represented by adequate counsel despite Texas's failure to follow the Convention. *Id.* at 520. This present matter differs in that there is no showing of what

evidence the Mexican consulate would have produced, but that distinction only makes Murphy's case weaker - the Court will not overturn his sentence based on speculation of what might have been. More importantly, Murphy has never raised the Claim T arguments before Virginia courts. As explained above, although the claim is exhausted under Virginia law; however, federal review is barred under *Bassette*. Claim T is thus procedurally defaulted and that claim must be denied.

III.

The thrust of Murphy's cause and prejudice argument is that his state habeas attorney exhibited such neglect of his case, and made uncalled for unilateral decisions, that he ceased to be Murphy's agent, and so his actions are not attributable to Murphy. Despite the petitioner's attempt to dress up this argument as something different, at bottom it is exactly the same argument made by the petitioner in *Coleman* and rejected by the United States Supreme Court. *See Coleman*, 501 U.S. at 753-54. Default by the attorney, at least as far as missing filing deadlines, is attributable to the client, and under *Coleman*, Murphy's state habeas corpus attorney was his agent for purposes of meeting such deadlines. Therefore, Murphy has not shown any cause and prejudice that justifies not adhering to the general rule regarding procedural bars enunciated in *Coleman*.

IV.

Two of Murphy's claims are not entirely procedurally barred. Claim O was raised on direct appeal to the Virginia Supreme Court. Therefore this claim has been exhausted, and federal review is proper pursuant to 28 U.S.C. § 2254(b). Murphy contends that the trial judge's thirty minute recess to review the mitigation evidence was inadequate to fully evaluate the evidence presented. Relying on *Correll v. Commonwealth* 352 S.E.2d 352, 360 (Va.), *cert. denied* 482 U.S. 931 (1987),

the Virginia Supreme Court rejected Murphy's claim, *Murphy v. Commonwealth*, 431 S.E.2d 48, 51-52 (Va.), *cert. denied*, 510 U.S. 928 (1993), and opined that although it is the fact finder's duty to consider this mitigation evidence, it does not require the trial court to forego the imposition of the death penalty. *Id.* at 52. Furthermore, the Virginia Supreme Court found as a matter of fact that the trial court did consider all the evidence in mitigation. *Murphy*, 431 S.E.2d at 52. This finding shall be presumed to be correct unless the applicant establishes "that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 U.S.C. § 2254(d)(2). The Virginia Supreme Court stated that "[t]he trial court's comments . . . demonstrate that the court maturely, carefully, and calmly deliberated the full range of issues." *Murphy*, 431 S.E.2d at 52; *see also Waye v. Commonwealth* 251 S.E.2d 202, 213 (Va.), *cert. denied* 442 U.S. 924 (1979) (stating that twenty-five minute jury deliberation gave no indication that the jury "did not maturely, carefully, and calmly deliberate the full range of issues or . . . make an individualized decision on the defendant's [death] sentence"). Murphy has presented no evidence to rebut the Virginia Supreme Court's finding that the trial court adequately considered the mitigation evidence other than the fact that the trial court only considered this evidence for thirty mimutes. Therefore, the Virginia Supreme Court's finding that the trial court adequately considered the mitigation evidence and that the death penalty remained the appropriate sentence in light of this evidence is presumed to be correct. *See* 28 U.S.C. § 2254(d).

Murphy's Claim Q concerning the constitutionality of the Virginia statutes which pertain to the aggravating circumstances of future dangerousness and vileness was raised in his state habeas petition as Claim X. Because this claim was not raised at trial or on direct appeal, the claim is defaulted before the Virginia and federal courts under the *Slayton* rule. Moreover, Murphy's failure

to perfect a timely state habeas appeal also bars federal collateral review of these claims. *See Coleman*, 501 U.S. at 750.

Murphy, however, did raise one part of Claim Q (Fed. Pet. at 101 ¶ 326(e)) on direct appeal to the Virginia Supreme Court. Therefore, this claim has been exhausted, and federal review is proper pursuant to 28 U.S.C. § 2254(b). Murphy claimed that the evidence was not sufficient to conclude beyond a reasonable doubt the probability that he would commit future criminal acts of violence that would constitute a continuing serious threat to society. *See Murphy*, 431 S.E.2d at 53. The Virginia Supreme Court reviewed the trial court record and rejected Murphy's claim that the evidence did not support the conclusion of his future dangerousness. *Id.* This factual determination by the State court shall be presumed to be correct unless the applicant establishes that the factfinding procedures employed by the State were not adequate. 28 U.S.C. § 2254(d)(2). Murphy has produced no evidence to rebut the trial court's finding that Murphy poses a continued risk of future dangerousness and threat to society. Therefore, the trial court's finding is presumed to be correct. *See* 28 U.S.C. § 2254(d).

V.

For the foregoing reasons, the respondent's motion to dismiss the petition for a writ of habeas corpus is granted and the petition for a writ of habeas corpus is dismissed.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

July 26, 1996
DATE

Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

MARIO BENJAMIN MURPHY,
Petitioner-Appellant,

v.

J. D. NETHERLAND, Warden,
Respondent-Appellee.

No. 96-14

MARIO BENJAMIN MURPHY,
Petitioner-Appellant,

v.

J. D. NETHERLAND, Warden,
Respondent-Appellee.

No. 96-21

UNITED MEXICAN STATES,
Amicus Curiae.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-95-856-3)

Argued: April 9, 1997

Decided: June 19, 1997

Before NIEMEYER, LUTTIG, and MICHAEL, Circuit Judges.

Dismissed by published opinion. Judge Luttig wrote the opinion, in which Judge Niemeyer and Judge Michael concur.

COUNSEL

ARGUED: Robert Franklin Brooks, Sr., HUNTON & WILLIAMS, Richmond, Virginia, for Appellant. Donald Richard Curry, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. **ON BRIEF:** William H. Wright, Jr., HUNTON & WILLIAMS, Richmond, Virginia; Michele J. Brace, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellant. James S. Gilmore, III, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. Professor John Charles Boger, Chapel Hill, North Carolina; Professor John B. Quigley, OHIO STATE UNIVERSITY COLLEGE OF LAW, Columbus, Ohio; S. Adele Shank, Columbus, Ohio, for Amicus Curiae.

OPINION

LUTTIG, Circuit Judge:

Appellant Mario Murphy pleaded guilty in the Circuit Court of the City of Virginia Beach to murder-for-hire and to conspiracy to commit capital murder and was sentenced to death. He now appeals the federal district court's denial of his habeas petition, in which he argued that the Commonwealth of Virginia violated his rights under the Vienna Convention on Consular Relations by failing to inform him that he could contact the Mexican consulate. Because Murphy has not made a "substantial showing of the denial of a constitutional right," we deny his motion for a certificate of appealability and dismiss the appeal. 28 U.S.C. § 2253(c).

I.

Murphy was hired by James Radcliff's wife, Robin Radcliff, and her lover, Gary Hinojosa, to kill James Radcliff for $5,000. After the failure of a plan in which Robin was to pretend like her car had broken down and then Murphy was to kill James when he came to help her, Murphy recruited two cohorts, Aaron Turner and James Hall, to help stage a burglary in which they would kill James Radcliff. Robin

Radcliff helped Murphy prepare for the killing by driving him to the apartment complex where she lived, pointing out her husband's car, and telling Murphy the specific bedroom in which James slept. *Murphy* v. *Commonwealth*, 431 S.E.2d 48, 50 (Va. 1993). On July 28, 1991, Murphy, Turner, and Hall met at Hinojosa's residence, where they dressed in dark clothes and armed themselves with a metal pipe and two knives before going to the Radcliffs' apartment. When the three assailants arrived at the Radcliffs' apartment, they entered through a window that Robin had unlocked as planned. According to the Virginia Supreme Court:

> When Murphy, Turner, and Hall entered the hallway leading to the bedroom, Robin left the bedroom, walked past the assailants, and went to the living room. The three men entered the bedroom where James was sleeping and closed the door. Turner struck James "pretty hard" in the head with a metal pipe. James then sat up in bed and Turner handed the pipe to Murphy, who hit James in the head with the pipe at least twice.
>
> James appeared to be "knocked out" as a result of the blows to his head. Murphy and Turner began stabbing him. Murphy "had a big rush of adrenaline" and he stabbed the victim twice, "once in the front of . . . his upper body and then once in the back." Turner placed a knife to James' neck and "tried to slit his throat." Hall, "right behind" Murphy and Turner, was hitting James with a pipe.
>
> James "was just laying in the bed bleeding." Murphy grabbed a telephone and handed it to Hall, who "ripped it out of the wall." Murphy, Turner, and Hall ran from the bedroom to the living room, where they removed a videocassette recorder and a video game. Hinojosa, Robin, and Tina and Michael Bourne had instructed them to remove these items "to make it look like a burglary." Murphy, Turner and Hall placed these items in a duffel bag. They left the apartment through the window that they had entered.

Id. at 50-51. After the police arrived, James Radcliff was taken to the hospital where he was pronounced dead.

When Murphy was arrested by the Virginia Beach police on September 4, 1992, he waived his constitutional rights and confessed to killing James Radcliff. *Id.* at 51. Murphy pleaded guilty in the Circuit Court of the City of Virginia Beach to murder-for-hire and to conspiracy to commit capital murder. The court entered convictions on both counts, and expressly found that Murphy's pleas were voluntary and intelligent. J.A. at 13-19, 687-89. After a separate sentencing hearing, the court found that Murphy's conduct constituted "aggravated battery" and demonstrated "depravity of mind" and that Murphy represented "a continuing serious threat to society." J.A. at 135-138. The Court sentenced Murphy to death for the murder of James Radcliff and imposed a twenty-year sentence for the conspiracy conviction. J.A. at 138. The convictions and sentences were affirmed by the Virginia Supreme Court.

The state courts also dismissed Murphy's state habeas claims, finding them all to be either procedurally barred or without merit. Murphy noted an appeal to the Virginia Supreme Court on August 24, 1994, but did not file his petition for appeal until November 2, 1994, one day too late under Virginia law. The Virginia Supreme Court dismissed the appeal as untimely.

Murphy filed his federal habeas petition on April 30, 1996, claiming, among other things, that both his conviction and death sentence are constitutionally invalid because the Virginia Beach authorities failed to notify him that, as a foreign national of Mexico, he had a right under the Vienna Convention on Consular Relations to contact the consulate of Mexico.[1] J.A. at 474-83. The district court rejected

[1]Article 36(1)(b) of the Vienna Convention provides:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

21 U.S.T. at 101.

all of his claims, holding that his Vienna Convention claim was procedurally defaulted because it had not been raised in state court. J.A. at 774-84.

On appeal, Murphy's principal argument is that his Vienna Convention Rights were violated. As an extension of this argument, Murphy argues for the first time on appeal that the violation of the Vienna Convention rendered his guilty plea involuntary.

II.

In order to obtain a certificate of appealability, a petitioner whose habeas petition was denied by a district court must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[3] Murphy's argument that his rights under the Vienna Convention were violated does not satisfy section 2253(c)(2)'s requirement because even if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly

[3] Section 2253 provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) *A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.*
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253 (emphasis added). There is no issue regarding retroactivity in this case because Murphy filed his federal habeas petition six days after the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, was signed into law.

does not create *constitutional* rights. Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional* rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that a treaty must "be regarded in courts of justice as equivalent to an act of the legislature").

Even were the district court's denial of habeas relief appealable, we would find Murphy's Vienna Convention claim to be procedurally barred because he did not raise it in state court and he cannot show cause and prejudice for his default. Murphy argues that there was cause for his failure to raise the Vienna Convention claim in state court because of the novelty of this claim and because the state failed to advise him of his "rights" under the Convention. However, not only did Murphy never raise his novelty argument in the district court, there is absolutely no cause for his not having done so. The Vienna Convention, which is codified at 21 U.S.T. 77, has been in effect since 1969, and a reasonably diligent search by Murphy's counsel, who was retained shortly after Murphy's arrest and who represented Murphy throughout the state court proceedings, would have revealed the existence and applicability (if any) of the Vienna Convention. Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national. Counsel in other cases, both before and since Murphy's state proceedings, apparently had and have had no difficulty whatsoever learning of the Convention. *See, e.g., Faulder* v. *Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *Waldron* v. *I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993); *Mami* v. *Van Zandt*, No. 89 Civ. 0554, 1989 WL 52308 (S.D.N.Y. May 9, 1989); *United States* v. *Rangel-Gonzalez*, 617 F.2d 529, 530 (9th Cir. 1980); *United States* v. *Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979); *United States* v. *Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979). Indeed, Murphy's primary argument is that "[e]ven the most diligent counsel would have been sorely pressed to recognize the existence" of the Vienna Convention prior to the publication of *Faulder* v. *Johnson*, 81 F.3d 515 (5th Cir. 1996), Appellant's Br. at 22. Apparently unbeknownst to Murphy's appellate counsel, however,

Faulder's attorney discovered the Convention prior to the December 2, 1992 filing of Faulder's habeas petition, over a year before Murphy filed his state habeas petition. Nor can the Commonwealth's failure to notify Murphy of any rights he may have had under the Vienna Convention constitute cause for failure to raise his Vienna Convention claim in state court, as Murphy has shown no "external impediment preventing [his] counsel from constructing or raising the claim." *Murray* v. *Carrier*, 477 U.S. 478, 492 (1986). The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a reasonably diligent investigation by his attorney, and the factual predicate for that claim — that Murphy is a citizen of Mexico — was obviously within Murphy's knowledge.

Murphy has also failed to establish prejudice from the alleged violation of the Vienna Convention because he is unable to explain how contacting the Mexican consulate would have changed either his guilty plea or his sentence. Murphy argues that he was prejudiced by the Commonwealth's failure to notify him of his right to contact the Mexican consulate because the consulate could have helped him either obtain a plea bargain or obtain mitigating evidence for the sentencing hearing. As to the assistance that might have been provided with respect to the plea bargain, Murphy argues that, because his cohorts did not receive the death penalty, his death sentence must have been the result of ethnic discrimination which somehow could have been avoided by help from the Mexican consulate. Presumably, this is some sort of help that his attorney was unable to provide but that would have led the prosecutor to offer Murphy a lighter plea. The prosecutor in Murphy's case, however, stated "unequivocally" that Murphy's attorney approached him for a plea bargain and that he "would not have entered into a plea agreement with Murphy under any circumstances because of Murphy's primary role in the murder and the fact that he recruited others to participate in the murder." J.A. at 787. In light of Murphy's greater culpability, the prosecutor's decision to offer plea bargains to the other defendants but not to Murphy is obviously reasonable and nondiscriminatory. Furthermore, even if the prosecution's refusal to offer a plea bargain was discriminatory, Murphy offers no evidence that the Mexican consulate could have offered any assistance that his attorney did not. There is also no evidence to support Murphy's generalized assertion that the Mexican consulate could have helped him obtain mitigating evidence from

Mexico that would have affected his sentencing hearing. As the district court found, Murphy has made "no showing of what evidence the Mexican consulate would have produced." J.A. at 781-82. Furthermore, Murphy's assertion that the Mexican consulate could have helped him obtain character testimony from his relatives in Mexico does not establish prejudice because Murphy has failed to show how assistance from the consulate was necessary to obtain such testimony and because such character testimony would have been largely duplicative of the character testimony that was actually presented at the sentencing hearing. J.A. at 59-61, 63-75.

III.

Perhaps in an attempt to make a "substantial showing of the denial of a constitutional right," and thereby to obtain a certificate of appealability, Murphy argues for the first time on appeal that his guilty plea was involuntary because of the state's failure to advise him of his Vienna Convention "rights." Because Murphy did not even raise this claim in his *federal* habeas petition, much less his state habeas petition, it plainly cannot provide a ground for relief.[3] Furthermore, this claim is procedurally barred for the same reasons that the substantive Vienna Convention claim is barred. Thus, although the involuntary plea argument constitutes a claimed violation of a constitutional right, it in no way constitutes a "*substantial* showing of the denial of a constitutional right" as required in order to obtain a certificate of appealability. 28 U.S.C. § 2253 (emphasis added). Thus, we deny the certificate of appealability on the involuntary plea claim and find that that claim, too, would fail even were it appealable.

[3] In Claim B of his federal habeas petition, Murphy alleged that his guilty plea was invalid because "at the time of his plea, Mario had not been advised of a viable defense to the charge of capital murder." J.A. at 207. This "viable defense," however, was that his trial counsel did not advise him that the state had to prove that he committed the murder *for hire*. J.A. at 208. Although Murphy eventually amended his federal habeas petition to add a substantive Vienna Convention claim, that additional claim was not a claim that his plea was involuntary. J.A. at 474-82. Murphy's suggestion that he somehow incorporated the Vienna Convention/involuntary plea claim into his petition when he referred to such a claim in a footnote in his opposition to the Warden's motion to dismiss the habeas claim is to no avail.

The appeal is dismissed pursuant to 28 U.S.C. § 2253.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

THE REPUBLIC OF PARAGUAY, ET AL.

Plaintiffs,

v.

GEORGE ALLEN, GOVENOR OF VIRGINIA, ET AL.

Defendants.

Civil Action Number 3:96cv745

FINAL ORDER

This matter is before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to FED.R.CIV.PROC. 12(b)(1). In the alternative, the defendants ask the Court to dismiss the action for failure to state a claim pursuant to FED.R.CIV.PROC. 12(b)(6). For the reasons set forth in the accompanying Memorandum Opinion, the case is DISMISSED for lack of subject matter jurisdiction.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Nov. 27, 1996
DATE

Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

THE REPUBLIC OF PARAGUAY, ET AL.

Plaintiffs,

v.

GEORGE ALLEN, GOVERNOR OF VIRGINIA, ET AL.

Defendants.

Civil Action Number 3:96CV745

MEMORANDUM OPINION

This matter is before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to FED.R.CIV.PROC. 12(b)(1). In the alternative, the defendants ask the Court to dismiss the action for failure to state a claim pursuant to FED.R.CIV.PROC. 12(b)(6). For the reasons set forth below, the Court GRANTS the motion to dismiss for lack of subject matter jurisdiction.

I. BACKGROUND

This case arises from the arrest and conviction of Angel Breard. Mr. Breard is a dual citizen of Paraguay and Argentina. He came to the United States on a student visa in 1986. He has remained in this country since then. In 1993, a jury found Mr. Bread guilty of the rape and stabbing death of thirty-nine year old Ruth Dickie. The trial court sentenced him to death for these crimes. On August 30, 1996, Mr. Bread filed a petition for a writ of habeas corpus in this Court.

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On September 12, 1996, the Republic of Paraguay, Jorge J. Prieto, Ambassador of the Republic of Paraguay to the United States and Jose Dos Santos, Consul General of the Republic of Paraguay to the United States filed this action. Plaintiffs seek redress for alleged treaty violations stemming from Mr. Bread's arrest.

In 1970, the United States and the Republic of Paraguay entered into the Vienna Convention on Consular Relations, Apr. 24 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention"). Article 36(1) states that if an arrested foreign citizen so requests:

> (b) the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Paraguay and its officials argue that defendants, various officials representing the state of Virginia, failed to comply with this provision.

Plaintiffs also insist that the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty") grants similar privileges. The United States and Paraguay entered into this treaty on February 4, 1859. It is still in effect. Although the Friendship Treaty does not contain a notice provision similar to that in the Vienna Convention, it does contain a "most favored nation clause." Under Article XII of the Treaty, "the Diplomatic Agents and Consuls

of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, there granted to Agents of any other Nation whatever." Based on this clause, Plaintiffs contend that they are entitled to immediate and mandatory notification of the arrest of any Paraguayan national. The United States has extended this privilege to other nations in bilateral agreements. *See, e.g.*, Convention Regarding Consular Officers, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426; Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2) & sec. 1 of protocol, 19 U.S.T. 5018; Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, sec. 5, 30 U.S.T. 17.

In addition, Mr. Dos Santos argues that defendants' inaction gives rise to a claim under 42 U.S.C. § 1983. Mr. Dos Santos is the Consul General of the Republic of Paraguay to the United States. In his official capacity, he has jurisdiction over the consular district encompassing the Commonwealth of Virginia.

Plaintiffs request several forms of declaratory and injunctive relief. In particular, they ask that this Court:

1. Declare that defendants violated the Vienna Convention and Friendship Treaty by failing to notify plaintiffs of Breard's arrest.
2. Declare that defendants continue to violate both treaties by failing to afford plaintiffs a meaningful opportunity to give Breard assistance during the proceedings against him.
3. Declare Breard's conviction void.
4. Enjoin defendants from taking any action based on the conviction and declare that any further action based on the conviction is a continuing violation of the treaties.
5. Grant an injunction vacating Breard's conviction and directing defendants to abide by the treaties during any future proceedings against Bread.

Defendants have filed a motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction. Defendants' arguments fall into two general categories: (1) that this

Court does not have subject matter jurisdiction over the claims presented and (2) that the plaintiffs' claims are otherwise non-justiciable.

II. SUBJECT MATTER JURISDICTION

A. Eleventh Amendment Immunity

The Eleventh Amendment places constitutional limits on federal court subject matter jurisdiction. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The text of the amendment divests this Court of jurisdiction over actions against a state by "Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend XI. This language was soon interpreted to prohibit other actions against a state in federal court. *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890) (Eleventh Amendment bars suits against a state by one of its citizens); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991) (Eleventh Amendment bars suits against a state by an Indian Tribe). In particular, the Eleventh Amendment bars suits by a foreign government against a state government in federal court. *Seminole Tribe of Florida v. Florida* 134 L Ed. 2d 252, 283 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

The Eleventh Amendment also bars suits against state officials that are in fact suits against a state. *Pennhurst*, 465 U.S. at 101-02. However, there is a narrowly crafted exception to this rule. A party at risk of or suffering from a violation of federally protected rights may seek to enjoin the offending state officers. *Ex Parte Young*, 209 U.S. 123 (1908). Before issuing an *Ex Parte Young* type injunction, the plaintiffs must satisfy two criteria: (1) they must show that they seek a remedy for a continuing violation of federal law and (2) they must show that the relief is prospective. *Green v. Mansour*, 474 U.S. 64, 68 (1986).

Much of the debate over the doctrine of *Ex Parte Young* has involved the second criterion. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274 (1989) (allowing award of attorney's fees as ancillary to the grant of prospective relief); *Edelman v. Jordan*, 415 U.S. 651 (1974) (discussing the distinction between retroactive and prospective relief). Here, however, the Court must determine if Paraguay is the victim of a continuing violation of federal law. The Supreme Court has considered this issue on at least two occasions. *See, e.g., Papasan v. Allen*, 478 U.S. 265 (1986); *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Papasan*, the Court distinguished those cases properly reviewable under the doctrine of *Ex Parte Young* from those that "stretch that case too far." "Young has been focused on cases in which a violation of federal law by a state is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." *Id.* at 277-78. For example, in *Milliken*, the defendants were perpetuating a system of *de jure* segregation. They were in violation of federal law at the precise moment when the case was filed.

That is not the case here. The complaint does not state that defendants continue to deny plaintiffs access to Breard. There is no allegation that defendants refuse to allow plaintiffs to give Mr. Bread legal assistance. In fact, officials from the Republic of Paraguay assisted in the preparation of Breard's habeas petition filed before this Court. Now that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties.

Plaintiffs urge that but for Virginia's alleged violations of the treaties, Mr. Breard would not be on death row today. Assuming the validity of this assertion, it is a tragic consequence of Virginia's failure to abide by the law. Nonetheless, it is still a *consequence* of the violation and not a continuing wrong. Although this Court is disenchanted by Virginia's failure to embrace and

abide by the principles embodied in the Vienna Convention and Friendship Treaty, the Eleventh Amendment operates to bar retroactive relief. *Papasan*, 478 U.S. 278; *Cory v. White*, 457 U.S. 85, 90 (1982), *Edelman* 415 U.S. 666-69.

B. District Court Review of State Court Proceedings

Federal district courts are courts of limited jurisdiction. With the exception of federal habeas review, district courts do not have jurisdiction to review final decisions of a state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Preiser v.* Rodriguez, 411 U.S. 475, 500 (1973). The Fourth Circuit has stated the precise limits of this Court's powers. "If the . . . claims presented to a United States district court are inextricably intertwined with the merits of a state court judgment, then the district court is in essence being called upon to review the state-court decision. This the district court cannot do." *Leonard v. Suthard*, 927 F.2d 168, 169-70 (4th Cir. 1991) (internal citations and quotations omitted).

Yet, this is precisely what the plaintiffs request. They implore the Court to vacate Breard's conviction. Plaintiffs argue that this case is distinguishable from the cases above because this case is not an appeal. Paraguay and its officials do not request that the Court vacate Bread's sentence because of trial defects. Instead, plaintiffs are suing to vindicate their own rights under the treaties. Furthermore, this is the first forum in which plaintiffs have sought relief. This is an accurate statement of the procedural posture of this case. Nevertheless, it does not vitiate the legal principles enunciated by the Supreme Court and the Fourth Circuit. Simply stated, this Court has no authority to disturb a state court ruling regardless of the procedural posture of the litigants. That power rests solely with the Supreme Court of the United States. *Feldman*, 460 U.S. at 476.

III. JUSTICIABILITY

A. Paraguay's Standing under the Treaties

Defendants argue that Paraguay does not have standing. A plaintiff has standing to sue in federal court if: (1) the plaintiff has suffered an injury; (2) the defendants caused the injury; and (3) the injury is redressable by the Court. *Finlator, et al. v. Powers*, 902 F.2d 1158, 1160 (4th Cir. 1990). First, defendants insist that this Court has no power to redress the alleged treaty violations because the treaties do not provide a mechanism for litigation in federal court. Defendants have cited no authority for the proposition that the language of a treaty, or of any other contract, must set forth all applicable remedies. "Treaties are contracts between sovereigns." *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). They have the same force as federal law. *United States v. Alvarez-Machain*, 504 U.S. 655, 668 (1992). As a party to the treaties, Paraguay has standing to seek redress for violations. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.) (treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress"), *cert. denied*, 498 U.S. 878 (1990). Absent any other limitations, this Court has the power to interpret the treaties and fashion an equitable remedy. *See, e.g., Tabion*, 73 F.2d 535 (4th Cir. 1996) (construing the Vienna Convention); *In re Grand Jury*, 817 F.2d 1108 (4th Cir. 1987) (same); *U.S. v. Chindawongse, et al*, 771 F.2d 840 (4th Cir. 1985) (same).

Similarly, defendants maintain that this Court may not enforce the treaties because they are not "self-executing." The term "self- executing" has two distinct meanings in international law. *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (citations omitted). Most frequently, the term is used to refer to a treaty that does not require

implementing legislation before becoming federal law. *Id.* The parties agree that the treaties are "self-executing" under this definition. However, the term "self-executing" also denotes a treaty that confers rights of action on private individuals. *Id.* Absent such language, a private party may not seek redress for treaty violations. *Argentine Republic v. Armerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (Geneva Convention on High Seas does not provide rights to private persons); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir.) (Hague Convention on War on Land does not provide rights to private persons), *cert. denied*, 506 U.S. 955 (1992). Defendants correctly note that the Vienna Convention and the Friendship Treaty are not "self-executing" in this sense. However, this observation has no bearing on the issues before this Court. Paraguay is not a private individual seeking enforcement of the treaty. It is an actual party to the contract and it has standing based on this status. *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("[u]nder international law, it is the contracting foreign government that has the right to complain about a violation"), *cert. denied* 480 U.S. 919 (1987).

Finally, defendants argue that this action is an impermissible attempt to assert third-party standing. A third-party may not assert the rights of another unless the third party demonstrates that the real party in interest in unable to litigate by virtue of "inaccessibility, mental incompetence, or other disability." *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990): *see also Powers v. Ohio*, 499 U.S. 400, 411 (1991). Although Paraguay seeks relief that would also benefit Mr. Breard, it is not asserting Mr. Breard's rights. As indicated above, Paraguay is a signatory to the treaties. It is the real party in interest in this matter and it has standing to seek redress. *Matta-Ballesteros*, 896 F.2d at 259; *Rosenthal*, 793 F.2d at 1232.

B. Mr. Dos Santos' Standing under §1983

Only Jose Dos Santos, Consul General of the Republic of Paraguay, has asserted a claim under §1983. In their motion to dismiss, defendants assume that Mr. Dos Santos, a Paraguayan official, is not a "person" within the meaning of the statute. This assumption is erroneous. *See, e.g., United States v. Wong Kim Ark*, 169 U.S. 649, 678-81 (1898) (consul is person "subject to the jurisdiction" of the United States); *see also, Plyer v. Doe*, 457 U.S. 202, 211-213 (1982) (explaining that the term "within the jurisdiction of the United States" encompasses all persons within the territorial jurisdiction of the United States). Mr. Dos Santos is a proper plaintiff. Thus, his cause of action is not susceptible to a motion to dismiss for failure to state a claim based on defendants' theory.

C. Appropriateness of Declaratory Relief

In defendants' opinion, this case is moot because they are no longer violating the treaties. As of April 1996, plaintiffs have been granted unfettered access to Mr. Breard. This turn of events does not render the case moot. "Voluntary cessation of allegedly illegal conduct does not deprive [a] tribunal of the power to hear and determine [a] case." *Commonwealth of Virginia Ex. Rel. Coleman v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980) ((citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). In such cases, defendants have the burden of showing that they will not repeat the wrong. *Id.* Although defendants urge the Court to deny declaratory relief, they have not set forth one piece of evidence to support their heavy burden.[1] Thus, absent any jurisdictional limitations, this case is suitable for declaratory relief.

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[1]In fact, there is evidence that the Commonwealth has disregarded the Vienna Convention on at least one other occasion. *See, Murphy v. Netherland*, No. 3:95cv856, Memorandum Opinion at 6-8 (E.D. Va. July 26, 1996) (discussing Virginia's failure to notify Mexico when Mr. Murphy was detained, tried, and convicted).

IV. CONCLUSION

For the reasons stated above, this Court lacks subject matter jurisdiction over the issues presented. Accordingly, the Court GRANTS defendants' motion to dismiss.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

Nov. 27, 1996
DATE

Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

THE REPUBLIC OF PARAGUAY; JORGE I. PRIETO, Ambassador of the Republic of Paraguay to the United States; JOSE ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs-Appellants,

v.

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia; RICHARD CULLEN, Attorney General for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Honorable, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; ROBERT A. DREISCHER, Acting Chief of Police of Arlington County; RONALD J. ANGELINE, Director of Corrections for the Commonwealth of Virginia,

Defendants-Appellees.

No. 96-2770

UNION INTERNATIONALE DES AVOCETS; UNITED STATES OF AMERICA; FREDERICK M. ABBOTT; DAVID J. BEDERMAN; RICHARD B. BILDER; DAVID D. CARON; ANTHONY D'AMATO; LORI FISLER DAMROSCH; WILLIAM DODGE; MARTHA A. FIELD; JOAN M. FITZPATRICK; EGON GUTTMAN; LOUIS HENKIN; HAROLD HONGJU KOH; BURT LOCKWOOD; STEFAN A. RIESENFELD; OSCAR SCHACHTER; HERMAN SCHWARTZ; ANNE-MARIE SLAUGHTER; RALPH GUSTAV STEINHARDT; DAVID WEISSBRODT,

Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-96-745-R)

Argued: June 4, 1997

Decided: January 22, 1998

Before WIDENER and MURNAGHAN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Widener and Judge Murnaghan joined.

COUNSEL

ARGUED: Donald Francis Donovan, DEBEVOISE & PLIMPTON, New York, New York, for Appellants. Donald Richard Curry, Senior

Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees. Douglas Neal Letter, Appellate Litigation Counsel, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amici Curiae. **ON BRIEF:** Barton Legum, Michael M. Ostrove, Alexander A. Yanos, DEBEVOISE & PLIMPTON, New York, New York; Loren Kieve, DEBEVOISE & PLIMPTON, Washington, D.C.; Rodney A. Smolla, Linda A. Malone, Marshall-Wythe School of Law, COLLEGE OF WILLIAM AND MARY, Williamsburg, Virginia; Leslie M. Kelleher, T.C. Williams School of Law, UNIVERSITY OF RICHMOND, Richmond, Virginia, for Appellants. James S. Gilmore, III, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; Ara L. Tramblian, Deputy County Attorney, OFFICE OF THE COUNTY ATTORNEY, Arlington, Virginia, for Appellees. Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States. John Cary Sims, Sacramento, California; Steven A. Hammond, HUGHES, HUBBARD & REED, L.L.P., New York, New York, for Amicus Curiae Union Internationale.

OPINION

PHILLIPS, Senior Circuit Judge:

The Republic of Paraguay and its Ambassador and Consul General to the United States appeal from the district court's dismissal of their action seeking declaratory and injunctive relief against the Governor and other officials of the Commonwealth of Virginia (hereinafter "the Commonwealth" or "Commonwealth Officials"). Paraguay sought a declaration of violation by the Commonwealth of treaties between Paraguay and the United States, the vacatur of a capital conviction and death sentence imposed by the Commonwealth on a Paraguayan national in alleged violation of the treaties, and an injunction against further violations. The district court determined that it did not have subject matter jurisdiction over the case and dismissed it pursuant to Fed. R. Civ. P. 12(b)(1). We affirm.

I

Angel Francisco Breard was arrested on August 17, 1992, by the Arlington, Virginia police on suspicion of the murder of Ruth Dickie, who was killed in February 1992. Though Breard is a citizen of the Republic of Paraguay, the Arlington and Virginia authorities did not advise him of any right to contact the Paraguayan consulate to consult with it throughout his detention and trial. The Circuit Court of Arlington County did, however, appoint two attorneys to represent Breard. On June 24, 1993, after a four-day trial, a jury convicted Breard of capital murder and attempted rape, and fixed punishment for the rape at ten years' imprisonment and a fine of $100,000. After a separate sentencing proceeding, the jury recommended that Breard be sentenced to death for the murder, and after an additional hearing on September 9, 1993, the state court entered a final judgment imposing the death penalty. The Virginia Supreme Court then affirmed Breard's conviction and sentence on direct review, *Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994), and the United States Supreme Court denied certiorari. *See* 513 U.S. 971 (1994). At no point in his direct appeal did Breard allege that the Commonwealth had violated any treaty provision during the period of his detention and trial.

The circuit court then appointed new counsel to represent Breard in his state habeas corpus proceedings. In his state court petition Breard again failed to allege violations of any treaty. The circuit court dismissed Breard's petition in July 1995, and the Virginia Supreme Court refused his petition for appeal in January 1996. At some point after this date, Paraguay's ambassador and general consul became aware of Breard's conviction and sentence and sought to confer with Breard in accordance with international treaties providing that right. The Commonwealth acquiesced, and Paraguay's officers have been given free access to Breard since that time.

In August 1996, Breard filed a federal habeas corpus petition in the United States District Court for the Eastern District of Virginia in which he claimed that the Commonwealth had violated his rights under Article 36(1) of the Vienna Convention on Consular Relations ("Vienna Convention"), to which both Paraguay and the United States are signatories. That section provides:

> (b) [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) [C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261.

The district court dismissed Breard's petition on the ground of procedural default in failing to raise the treaty-violation claim at any point in the state court proceedings. *See Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) (citing *Gray v. Netherland*, 116 S. Ct. 2074, 2080-81 (1996)). Breard's appeal to this court from the dismissal of his petition is pending as of this writing.[1]

In September, 1996, the Republic of Paraguay, Jorge J. Prieto, its Ambassador to the United States, and Jose Antonio Dos Santos, its Consul General to the United States, (collectively "Paraguay") brought this action against the named Commonwealth officials alleging that Paraguay's separate rights under the earlier-quoted provisions

[1]The district court's dismissal of Breard's petition was affirmed by this court in an opinion filed contemporaneously with that in this case. *See Breard v. Netherland*, ___ F.3d ___, No. 96-25 (4th Cir. Jan. 22, 1998).

of the Vienna Convention and those of another treaty requiring comparable notification, had been violated by the Commonwealth's failure to inform Breard of his rights under the treaties and to inform the Paraguayan consulate of Breard's arrest, conviction and sentence.[2] The action included a joint claim based directly upon Paraguay's treaty rights and, for Dos Santos, a parallel claim under 42 U.S.C. § 1983 alleging denial of his rights under federal treaty law by the conduct of Commonwealth officials taken under color of state law.

In its claims, Paraguay sought as relief a declaration of treaty violation, a vacatur of Breard's conviction and sentence, and an injunction against further violations of the treaty provisions. The Commonwealth moved to dismiss the action under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on standing, subject matter jurisdiction, and merits grounds. The district court first determined that Paraguay and its officials had standing to bring their claims under the treaties, emphasizing that Paraguay was asserting its own rights and not those of Breard. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996). The court also concluded that Dos Santos had standing to maintain his

[2]The other treaty invoked is the Treaty of Friendship, Commerce, and Navigation ("Friendship Treaty") that was signed by the United States and Paraguay in 1859. Article XII of that Treaty provides that "the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever." Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., art. XII, 12 Stat. 1091. By later consular conventions the United States entered into agreements with the United Kingdom, among other nations, under which "[a] consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district." Consular Convention, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426. *See also* Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12, 19 U.S.T. 5018 ("The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state."). Paraguay invokes this agreement with "any other" nation as entitling it to the same notification respecting confinement or custody of its nationals as was provided for the "other" nation.

parallel § 1983 claim because he was a "person" within the meaning of the Act. *Id.* at 1275 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 678-81 (1898)).

The court ultimately decided, however, that it did not have subject matter jurisdiction because the claimants were not alleging a "continuing violation of federal law" and therefore could not bring their claims within the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908). 949 F. Supp. at 1273 (citing *Papasan v. Allain*, 478 U.S. 265 (1986), and *Milliken v. Bradley*, 433 U.S. 267 (1977)). Alternatively, the court held that it did not have "jurisdiction to review final decisions of a state court," and therefore could not order the vacatur of Breard's conviction and sentence obtained in Virginia's courts. 949 F. Supp. at 1273 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). The district court therefore dismissed the action.

This appeal followed.

II

Paraguay challenges both of the grounds upon which the district court dismissed the action for lack of subject matter jurisdiction. The Commonwealth defends the dismissal on both grounds and also urges as an alternative basis for affirmance that the claims raise only nonjusticiable "political questions."[3] We review *de novo* the district court's dismissal of the action for lack of subject matter jurisdiction. *See White v. United States*, 53 F.3d 43, 45 (4th Cir. 1995) (citing *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994)).

Because we consider it dispositive of the appeal, we address only the Eleventh Amendment ground of the district court's dismissal of the action for lack of subject matter jurisdiction.[4]

[3]The United States filed a brief and participated as amicus curiae in support of this position.

[4]We do not, therefore, address the *Rooker-Feldman* basis for the district court's dismissal, nor do we consider the "political-question" issue first raised on this appeal. Though both are important issues, they are better reserved for cases in which their resolution is critical to decision.

Though the basic Eleventh Amendment principles are settled and familiar, we summarize them here briefly. The Amendment imposes, in the form of sovereign immunity, "a constitutional limitation on the federal judicial power" over certain actions against unconsenting states of the Union. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Though the immunity thus provided runs literally only to actions by "Citizens of another state or by Citizens or Subjects of any foreign State," it has been judicially interpreted to run as well to actions by a state's own citizens, *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), by Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991), and, critically to this case, by foreign states, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *see also Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1129 (1996) (citing *Monaco* for principle).

The immunity extends not only to actions against States as named parties but to actions such as that here against state officials that are in fact actions against the state as the real party in interest. *See Pennhurst*, 465 U.S. at 101-02. Immunity in actions against state officials, is, however, subject to the critical exception announced in *Ex parte Young*, 209 U.S. 123 (1908), under which federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective. *See id.* at 149-50, *Green v. Mansour*, 474 U.S. 64, 68 (1985). This means that under the *Ex parte Young* exception, which is based upon the recognized fiction that the officials' conduct is not that of the state, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

Conversely, the exception does not permit federal courts to entertain claims seeking retrospective relief, either compensatory or other, for completed, not presently ongoing violations of federally-protected rights. *See Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (distinguishing for *Ex parte Young* purposes between retrospective and prospective relief).

The parties here join issue precisely on the questions whether the violations alleged by Paraguay are "ongoing" ones and whether the relief sought is only "prospective." We agree with the district court that the violation alleged here is not an ongoing one for *Ex parte Young* purposes and, with the Commonwealth, that the essential relief sought is not prospective.[8]

Paraguay says the violation is "ongoing" or "continuing" in the sense that its "consequences" persist in Breard's continuation in custody under death sentence without benefit of the timely counseling that was prevented by the violation. The Commonwealth counters that there is no ongoing violation of *Paraguay*'s treaty rights, as distinguished from those of Breard, because Paraguay is presently on notice of Breard's situation and the Commonwealth is not now preventing Paraguay from giving whatever aid and counsel to Breard it desires. The only "present consequences" being experienced from the past violation of treaty rights, says the Commonwealth, are any that Breard himself may be experiencing through lack of timely counseling, and these may, and have been, properly raised by Breard in his federal habeas corpus action.[9]

Paraguay seeks to avoid the obvious fact that the actual violation alleged is a past event that is not itself continuing by drawing on decisions allowing *Ex parte Young* suits which sought injunctive relief for what were considered to be ongoing consequences of past violations of federal rights. Specific reliance is placed on *Papasan v. Allain*, 478 U.S. 265 (1986), and *Milliken v. Bradley*, 433 U.S. 267 (1977), both of which allowed *Ex parte Young* actions for injunctive relief against what were considered to be the current, ongoing consequences of past violations.

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[8]The district court did not address, except to recognize it, the "prospective relief" issue; the Commonwealth has raised it both below and here.

[9]Which is an action against a state official, the prison warden, that itself is maintainable in federal court only by virtue of the *Ex parte Young* exception, as specifically implemented by 28 U.S.C. § 2254. *See Seminole Tribe*, 116 S. Ct. at 1182 (Souter, J., dissenting) (noting the point).

Reliance on those decisions is misplaced; the situations presented in those cases are not analogous in critical respects to those presented by Paraguay's action. In *Papasan*, the action sought injunctive relief to compel equalizing funding of a school district which had been and continued to be under-funded in relation to other districts of the state as a result of the State's unconstitutional sale 100 years earlier of property held in trust for the district's support. In *Milliken*, the action sought injunctive relief to compel state officials to fund a remedial education plan in order to eradicate the demonstrably continuing effects of a long-maintained state policy of racial segregation in a public school system.

Both of those cases involve classic examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights. As the district court put it, the state-official defendants in *Milliken* "were in violation of federal law at the precise moment when the case was filed." *See* 949 F. Supp. at 1273. Here, by contrast, again as the district court indicated, Paraguay's claim was not, as it could not be, that Commonwealth officials were continuing to prevent Paraguay, either by action or non-action, from providing aid and counseling to Breard at the time Paraguay filed its action. *See id.*

For the same reason, Paraguay's reliance on this court's decisions in *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989), and *Thomas S. by Brooks v. Flaherty*, 902 F.2d 250 (4th Cir. 1990), is misplaced. *Coakley* held that a state employee unconstitutionally discharged from his employment suffers a "continuing violation" of that property right that could be remedied by a federal injunctive decree requiring his reinstatement. *Thomas S.* held that persons subjected to unconstitutional treatment when formerly in state mental institutions suffered continuing violations of those constitutional rights after their release that could be remedied by a federal injunctive decree for their care. Again, those cases concerned classic claims of ongoing violations of federally-protected property and liberty rights. As in *Milliken* and *Papasan*, at the time that those actions were filed, responsible state officials were presently violating the claimants' ongoing rights.

Nor is the relief sought by Paraguay for the treaty violations in any true sense "prospective." Paraguay bases its prospective-relief conten-

tion on the fact that the relief sought is formally couched in injunctive, declarative terms and on the basis, as if it were dispositive of the question, that no monetary damages are sought. But when the essence is considered, the only presently effective relief sought for the violations claimed and conceded is quintessentially retrospective: the voiding of a final state conviction and sentence. That this could be effectuated in an injunctive or declaratory decree directed at state officials does not alter the inescapable fact that its effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation. Money damages are probably the purest and most recognizable form of retrospective relief, but surely not the only form, and the fact that that remedy is not sought whereas an injunctive or declarative form is, does not automatically establish that the *Ex parte Young* exception allows the action to proceed. *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (holding that Indian Tribe's action to enjoin state officials from continuing to exercise jurisdiction over lands claimed by Tribe, being "functional equivalent" of quiet title action against state, was barred by Eleventh Amendment notwithstanding claimed violation was continuing and the relief sought was only prospective in form).

III

We share the district court's expressed "disenchantment" with the Commonwealth's conceded past violation of Paraguay's treaty rights. *See* 949 F. Supp. at 1273. There are disturbing implications in that conduct for larger interests of the United States and its citizens.[7] But, we conclude that because the violation of federal treaty law was not ongoing when this action was filed, nor the relief sought prospective, the Eleventh Amendment does not permit the federal courts to provide a remedy against the Commonwealth officials sued in this action for their conceded past violations. *See United Mexican States v.*

[7]Made even more disturbing by the fact that this is not the only revealed violation. *See Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 26 (1997). The larger interests threatened are admirably pointed out by Senior Judge Butzner, specially concurring in *Breard v. Netherland*, ___ F.3d ___, ___, No. 96-25 (4th Cir. Jan. 22, 1998).

Woods, 126 F.3d 1220, 1223 (9th Cir. 1997) (holding to same effect in affirming dismissal on Eleventh Amendment immunity grounds of comparable action by Mexico and Mexican officials against Arizona officials).

AFFIRMED

UNITED STATES COURT OF APPEA_

FOR THE FOURTH CIRCUIT

FILED
February 26, 1998

No. 96-25
CA-96-366-3

Breard v. Pruett

M A N D A T E

The judgment of this Court dated 1/22/98 takes effect today.

PATRICIA S. CONNOR
CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,

v. Docket Nos. CR92-1467, 1664-1668

ANGEL BREARD,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Angel Breard be carried out on the 14th day of April, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 14, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

The Honorable Richard Trodden
Commonwealth's Attorney
Arlington County
1425 North Courthouse Road
Arlington, Virginia 22201

William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 25th day of February, 1998.

Paul F. Sheridan
Judge

0082

A COPY
TESTE: DAVID A. BELL, CLERK
BY B. H. Davis
DEPUTY CLERK

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY

TO: Mr. Eduardo Valencia-Ospina
Registrar
International Court of Justice
Peace Palace
The Hague
The Netherlands

Sir:

On behalf of the Republic of Paraguay and in accordance with article 40, paragraph 1, of the Statute of the Court and article 38 of the Rules of the Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Republic of Paraguay against the Government of the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to article I of the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.

Preliminary Statement

1. Article 36, subparagraph 1(b) of the Vienna Convention requires the competent authorities of a State Party to advise, "without delay," a national of another State Party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by article 36. "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State

if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner." *Id.*

2. As the Government of the United States stated in its Memorial in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*:

> a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.

1980 I.C.J. Pleadings 174 (citations omitted).

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. These actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. As a result of the breach, Paraguay is entitled to *restitutio in integrum*: the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

I. THE FACTS

Municipal Court Proceedings
Concerning Mr. Breard

5. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular

assistance under article 36, subparagraph 1(b) of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

6. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in article 36. In turn, Paraguay would have rendered that assistance.

7. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defense of its national (as described in paragraphs 8 and 10 below), monitor the conditions of its national's detention, or ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

8. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concerning the criminal justice system that a Paraguayan national might be expected to have.

9. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. He refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because – in the absence of advice from his consulate – he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would appeal to the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and death sentence.

10. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of

accepting or rejecting plea offers in light of those differences; an interpreter; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defense; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

11. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

12. In the Spring of 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

13. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default." *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal appellate court affirmed. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

14. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard has set an execution date of 14 April 1998. Absent intervention, officials of Virginia will then, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead." VA. STAT. ANN. § 53.1-234.

15. By petition for a writ of *certiorari*, Mr. Breard has now requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decision against him and grant a stay of his execution pending that review. The Supreme Court grants less than five percent of all *certiorari* petitions submitted to it. Moreover, in cases, such as Mr. Breard's, involving an imminent execution and submitted on an expedited basis, the Court frequently does not rule on the petition and accompanying request for interim relief until days, or even hours, before the scheduled execution.

Paraguay's Efforts To Secure
Relief In The United States

16. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought, among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its rights under the Convention in any future proceedings should Virginia, as Paraguay would expect, seek to prosecute Mr. Breard anew.

17. Paraguay did not seek from the federal court of first instance, and does not intend to seek from this Court, any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard if the competent authorities are so advised. Paraguay does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

18. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take

jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States. *Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996). Paraguay appealed the decision, which was affirmed. *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). During the appellate proceedings, the United States took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State Party to the Convention.

19. Paraguay has filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision. As explained above, a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted.

20. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay has also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State, "in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature." In a response delivered 3 June 1997, the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.

II. THE JURISDICTION OF THE COURT

21. Under article 36, paragraph 1 of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force."

22. The Republic of Paraguay and the United States are, as members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the

International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

23. Paraguay therefore submits that, upon the filing of the present application, the matters in dispute between Paraguay and the United States concerning Paraguay's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

III. The Claims of the Republic of Paraguay

24. The Government of the Republic of Paraguay claims that:

a. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to Paraguay, a State Party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations.

b. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to an arrested national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations with respect to Mr. Breard.

c. Pursuant to article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by article 36, subparagraph 1(b) of the Vienna Convention has effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to articles 5 and 36 of the Convention. The United States therefore has violated and is currently violating the foregoing obligation.

d. Pursuant to article 36, paragraph 2, of the Vienna Convention and article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under article 36. The United States has violated and is currently violating the foregoing obligation.

e. Pursuant to article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated and is currently violating the foregoing obligation.

IV. THE JUDGMENT REQUESTED

25. Accordingly, the Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default," or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the nonrepetition of the illegal acts.

V. JUDGE *AD HOC*

26. In accordance with the provisions of article 31 of the Statute and article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

VI. RESERVATION OF RIGHTS

27. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VII. PROVISIONAL MEASURES

28. The Republic of Paraguay requests that the Court indicate interim measures of protection, as set forth in a separate request filed concurrently with this Application.

* *

I have the honor to reassure the Court of my highest esteem and consideration.

Brussels, 3 April 1998

His Excellency Manuel María Cáceres
Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY

Brussels, 3 April 1998

1. I have the honor to refer to the Application submitted to the Court this day instituting proceedings in the name of the Republic of Paraguay against the Government of the United States of America and to submit, in accordance with article 41 of the Statute of the Court and articles 73, 74, and 75 of the Rules of the Court, an urgent request that the Court indicate provisional measures to preserve the rights of the Republic of Paraguay. The Court has jurisdiction pursuant to article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

2. The compelling facts underlying this request are set forth in the Application. On 1 September 1992, law enforcement officials of the Commonwealth of Virginia, one of the United States of America, arrested a national of Paraguay, Angel Francisco Breard. Mr. Breard was subsequently convicted and sentenced to death. At no time did these officials inform Mr. Breard of his right to communicate with his consulate, as required under article 36 of the Vienna Convention. Mr. Breard was and thus remained unaware of his rights under the Convention. As a result, Paraguay was not alerted to Mr. Breard's situation and was unable to exercise its right to render consular assistance until after he had already been tried, convicted, and sentenced.

3. Paraguay was therefore unable to protect its interests as provided for in articles 5 and 36 of the Vienna Convention. Similarly, it was unable to protect its detained national's interests as provided for in those articles.

4. As set forth in the Application, Paraguay submits that the actions of the Virginia officials, attributable to the United States, violated international legal obligations that the United States owes to Paraguay in its own right and in the exercise of its right of diplomatic protection of its national. As further set forth in the Application, Paraguay has requested that the Court declare that the United States has violated its obligations under the Vienna Convention; that the United States is obligated to restore the *status quo ante*; and that the United States is obligated to ensure that any future detention of or criminal proceedings against Mr. Breard or any other Paraguayan national in its territory be carried out in conformity with the international legal obligations the United States owes Paraguay.

5. By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on 14 April 1998, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead.

6. The importance and sanctity of an individual human life are well established in international law. As recognized by article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law.

7. Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favor.

8. On behalf of the Government of Paraguay, I therefore respectfully request that, pending final judgment in this case, the Court indicate:

a. That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

b. That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (a) immediately above and the results of those actions; and

c. That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case.

9. In view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Paraguayan citizen in violation of obligations the United States owes to Paraguay, Paraguay respectfully asks the Court to treat this request as a matter of the greatest urgency.

10. The Government of the Republic of Paraguay has authorized the undersigned to appear before the Court in any proceedings or hearings relating to this request that the Court may convene in accordance with the terms of article 74, paragraph 3, of the Rules of the Court.

His Excellency Manuel María Cáceres
Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands

General List No. 99

INTERNATIONAL COURT OF JUSTICE
9 April 1998

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *Vice-President* **WEERAMANTRY**, *Acting President*; *President* **SCHWEBEL**; *Judges* **ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK**; *Registrar* **VALENCIA-OSPINA.**

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 April 1998, whereby the Republic of Paraguay (hereinafter "Paraguay") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,

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Makes the following Order:

1. Whereas, in its aforementioned Application, Paraguay bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol");

2. Whereas, in the Application, it is stated that in 1992 the authorities of the Commonwealth of Virginia arrested a Paraguayan national, Mr. Angel Francisco Breard; whereas it is maintained that he was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court (the Circuit Court of Arlington County) in 1993, without having been informed, as is required under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, of his rights under that provision; whereas it is specified that among these rights are the right to request that the relevant consular office of the State of which he is national be advised of his arrest and detention, and the right to communicate with that office; and whereas it is also alleged that the authorities of the Commonwealth of Virginia also did not advise the Paraguayan consular officers of Mr. Breard's detention, and that those officers were only able to render assistance to him from 1996, when the Paraguayan Government learnt by its own means that Mr. Breard was imprisoned in the United States;

3. Whereas, in the Application, Paraguay states that Mr. Breard's subsequent petitions before federal courts in order to seek a writ of *habeas corpus* failed, the federal court of first instance having, on the basis of the doctrine of "procedural default", denied him the right to invoke the Vienna Convention for the first time before that court, and the intermediate federal appellate court having confirmed that decision; whereas, consequently, the Virginia court that sentenced Mr. Breard to the death penalty set an execution date of 14 April 1998; whereas Mr. Breard, having exhausted all means of legal recourse available to him as of right, petitioned the United States Supreme Court for a writ of *certiorari*, requesting it to exercise its discretionary power to review the decision given by the lower federal courts and to grant a stay of his execution pending that review, and whereas, while this request is still pending before the Supreme Court, it is however rare for that Court to accede to such requests; and whereas Paraguay stated, moreover, that it brought proceedings itself before the federal courts of the United States as early as 1996, with a view to obtaining the annulment of the proceedings initiated against Mr. Breard, but both the federal court of first instance and the federal appellate court held that they had no jurisdiction in the case because it was barred by a doctrine conferring "sovereign immunity" on federated states; whereas Paraguay also filed a petition for a writ of *certiorari* in the Supreme Court, which is also still pending; and whereas Paraguay furthermore engaged in diplomatic efforts with the Government of the United States and sought the good offices of the Department of State;

4. Whereas, in its Application, Paraguay maintains that by violating its obligations under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States prevented Paraguay from exercising the consular functions provided for in Articles 5 and 36 of the Convention and specifically for ensuring the protection of its interests and of those of its nationals in the United States; whereas Paraguay states that it was not able to contact Mr. Breard nor to offer him the necessary assistance, and whereas accordingly Mr. Breard "made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation"; and "did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay"; and whereas Paraguay concludes from this that it is entitled to *restitutio in integrum*, that is to say "the re-establishment of the situation that existed before the United States failed to provide the notifications . . . required by the Convention";

5. Whereas Paraguay requests the Court to adjudge and declare as follows:

> "(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum;*

(3) that the United States is under an international legal obligation not to apply to the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 3 April 1998, after having filed its Application, Paraguay also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Paraguay refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it reaffirms in particular that the United States has violated its obligations under the Vienna Convention and must restore the *status quo ante;*

8. Whereas, in its request for the indication of provisional measures of protection, Paraguay states that, on 25 February 1998, the Circuit Court of Arlington County, Virginia, ordered that Mr. Breard be executed on 14 April 1998; whereas it emphasizes that "[t]he importance and sanctity of an individual human life are well established in international law" and "[a]s recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law"; and whereas Paraguay states in the following terms the grounds for its request and the possible consequences of its dismissal:

"Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour";

9. Whereas Paraguay asks that, pending final judgment in this case, the Court indicate:

"*(a)* That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

(b) That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and

(c) That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case";

and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that the authorities . . . will execute a Paraguayan citizen";

10. Whereas, on 3 April 1998, the Ambassador of Paraguay to the Netherlands addressed a letter to the President of the Court requesting the Court to fix an early date for a hearing on his Government's request for provisional measures, asking the Member of the Court who, in accordance with the provisions of Article 13, paragraph 1, and Article 32, paragraph 1, of the Rules of Court, would exercise the functions of President in the case to "call upon the United States of America to ensure that Mr. Breard is not put to death before the Court's ruling on Paraguay's request for provisional measures"; and indicating that he had been appointed as Agent of Paraguay for the purposes of the case;

11. Whereas, on 3 April 1998, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents, communicated the text of them to that Government by facsimile and sent it a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also sent the Government of the United States a copy of the letter addressed that day to the President of the Court by the Agent of Paraguay;

12. Whereas, by identical letters dated 3 April 1998, the Vice-President of the Court addressed both Parties in the following terms:

"Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects";

and whereas, at a meeting held the same day with the representatives of both Parties, he advised them that the Court would hold public hearings on 7 April 1998 at 10 a.m., in order to afford the Parties the opportunity of presenting their observations on the request for provisional measures;

13. Whereas, by a letter dated 5 April 1998, received in the Registry on 6 April 1998, the Ambassador of the United States to the Netherlands informed the Court of the appointment of an Agent and a Co-Agent of his Government for the case;

14. Whereas, pending the notification under Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, by transmission of the printed text, in two languages, of the Application to the Members of the United Nations and to other States entitled to appear before the Court, the Registrar, on 6 April 1998, informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

15. Whereas, on 6 April 1998, the Registrar, in accordance with Article 43 of the Rules of Court, addressed the notification provided for in Article 63, paragraph 1, of the Statute to the States, other than the Parties to the dispute, which on the basis of information supplied by the Secretary-General of the United Nations as depositary appeared to be parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, at the public hearings held on 7 April 1998, in accordance with Article 74, paragraph 3, of

the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the Parties:

On behalf of Paraguay: by H. E. Mr. Manuel María Cáceres,
Mr. Donald Francis Donovan,
Mr. Barton Legum,
Dr. José Emilio Gorostiaga;

On behalf of the United States: by Mr. David R. Andrews,
Ms Catherine Brown,
Mr. John R. Crook,
Mr. Michael J. Matheson;

and whereas at the hearings a question was put by a Member of the Court, to which a reply was given orally and in writing;

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17. Whereas, at the hearings, Paraguay reiterated the line of argument set forth in its Application and its request for the indication of provisional measures;

18. Whereas at the hearing, the United States argued that Mr. Breard's guilt was well established, and pointed out that the accused had admitted his guilt, which Paraguay did not dispute; whereas it recognized that Mr. Breard had not been informed, at the time of his arrest and trial, of his rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, and indicated to the Court that this omission was not deliberate; whereas it nonetheless maintained that the person concerned had had all necessary legal assistance, that he understood English well and that the assistance of consular officers would not have changed the outcome of the proceedings brought against him in any way; whereas, referring to State practice in these matters, it stated that the notification provided for by Article 36, subparagraph 1 *(b)*, of the Vienna Convention is unevenly made, and that when a claim is made for failure to notify, the only consequence is that apologies are presented by the government responsible; and whereas it submitted that the automatic invalidation of the proceedings initiated and the return to the *status quo ante* as penalties for the failure to notify not only find no support in State practice, but would be unworkable;

19. Whereas the United States also indicated that the State Department had done everything in its power to help the Government of Paraguay as soon as it was informed of the situation in 1996; and whereas it stated that when, on 30 March 1998, Paraguay advised the Government of the United States of its intention to bring proceedings before the Court if the United States Government did not take steps to initiate consultation and to obtain a stay of execution for Mr. Breard, the Government of the United States had emphasized *inter alia* that a stay of execution depended exclusively on the United States Supreme Court and the Governor of Virginia;

20. Whereas the United States furthermore maintained that Paraguay's contention that the invalidation of the sentence of a person who had not been notified pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention could be required under that instrument, has no foundation in the relevant

provisions, their *travaux préparatoires* or the practice of States, and that, in the event, Mr. Breard has not been prejudiced by the absence of notification; and whereas it pointed out that provisional measures should not be indicated where it appears that the Applicant's argument will not enable it to be successful on the merits;

21. Whereas the United States also stated that, when the Court indicates provisional measures under Article 41 of its Statute, it must take the rights of each of the Parties into consideration and ensure that it maintains a fair balance in protecting those rights; whereas that would not be the case if it acceded to Paraguay's request in these proceedings; and whereas the measures requested by Paraguay would prejudice the merits of the case;

22. Whereas the United States finally alleged that the indication of the provisional measures requested by Paraguay would be contrary to the interests of the States parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would in particular be such as seriously to disrupt the criminal justice systems of the States parties to the Convention, given the risk of proliferation of cases; and whereas it stated in that connection that States have an overriding interest in avoiding external judicial intervention which would interfere with the execution of a sentence passed at the end of an orderly process meeting the relevant human rights standards;

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23. Whereas on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

24. Whereas Article I of the Optional Protocol, which Paraguay invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol";

25. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Paraguay and the United States are parties to the Vienna Convention and to the Optional Protocol, in each case without reservation;

26. Whereas Articles II and III of the aforementioned Protocol provide that within a period of two months after one party has notified the other of the existence of a dispute, the parties may agree to resort not to the International Court of Justice but to an arbitration tribunal or alternatively first to conciliation; but whereas these Articles

> "when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention . . ." (*United States Diplomatic and Consular Staff in Tehran, (United States of America* v. *Iran), Judgment, 24 May 1980, I.C.J. Reports 1980*, pp. 25-26);

27. Whereas, in its Application and at the hearings, Paraguay stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

28. Whereas at the hearing, the United States contended, for its part, that Paraguay had not established that the Court had jurisdiction in these proceedings, even prima facie; whereas it argued that there is no dispute between the Parties as to the interpretation of Article 36, subparagraph 1 *(b)*, of the Vienna Convention and nor is there a dispute as to its application, since the United States recognizes that the notification provided for was not carried out; whereas the United States maintained that the objections raised by Paraguay to the proceedings brought against its national do not constitute a dispute concerning the interpretation or application of the Vienna Convention; and whereas it added that there was no entitlement to *restitutio in integrum* under the terms of that Convention;

29. Whereas the United States moreover indicated to the Court that it had expressed its regret to Paraguay for the failure to notify Mr. Breard of his right to consular access, engaged in consultations with Paraguay on the matter and taken steps to ensure future compliance with its obligations under the Vienna Convention at both the federal and state level;

30. Whereas Paraguay asserts that it is nevertheless entitled to *restitutio in integrum*, that any criminal liability currently imposed on Mr. Breard should accordingly be recognized as void by the legal authorities of the United States and that the *status quo ante* should be restored in that Mr. Breard should have the benefit of the provisions of the Vienna Convention in any renewed proceedings brought against him, no objection to his continued detention meanwhile being made by Paraguay; whereas however the United States believes that these measures are not required by the Vienna Convention, would contravene the understanding underlying the adoption of Article 36 as well as the uniform practice of States, and would put this Court in a position of acting as a universal supreme court of criminal appeals;

31. Whereas there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and whereas this is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963;

32. Whereas the United States claimed nevertheless that prima facie there is no jurisdiction for the Court in this case as Paraguay has no legally cognizable claim to the relief it seeks nor any prospect ultimately of prevailing on the merits, because no prejudice to Mr. Breard has occurred;

33. Whereas the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits; and whereas the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits;

34. Whereas the Court finds that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Paraguay and the United States;

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35. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

36. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34);

37. Whereas the execution of Mr. Breard is ordered for 14 April 1998; and whereas such an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims;

38. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

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39. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of urgency, provisional measures in accordance with Article 41 of its Statute;

40. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudge findings the Court might make on the merits; and whereas the measures indicated would preserve the respective rights of Paraguay and of the United States; and whereas it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition;

41. For these reasons,

THE COURT

Unanimously,

I. *Indicates* the following provisional measures:

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

II. *Decides*, that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this ninth day of April, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Paraguay and the Government of the United States of America, respectively.

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(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judges ODA and KOROMA append declarations to the Order of the Court.

(Initialled) C.G.W.

(Initialled) E. V.O.

International Court of Justice

Press Communiqué 98/17

9 April 1998

Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)

Provisional measures

The Court calls on the United States to take measures to prevent the execution of Angel Breard, pending a final decision

THE HAGUE, 9 April 1998. The International Court of Justice (ICJ) today called on the United States to "take all measures at its disposal" to prevent the execution of Mr. Angel Francisco Breard, pending a final decision of the Court in the proceedings instituted by Paraguay. Mr. Breard is a Paraguayan national convicted of murder in Virginia (United States) whose execution is scheduled for 14 April 1998.

In its Order, adopted unanimously, the Court also requested the United States to inform it of all the measures taken in implementation of it.

Paraguay instituted proceedings against the United States on 3 April 1998 in a dispute concerning alleged violations of the Vienna Convention on Consular Relations of 24 April 1963. It maintains that Mr. Breard was arrested, tried, convicted and sentenced to death without Virginia advising him of his right to assistance by the consular officers of Paraguay, as required by the Vienna Convention. Accordingly, Paraguay asked the Court to adjudge and declare that it is entitled to restitutio in integrum, that is, the re-establishment of the situation that existed before the United States failed to provide the required notification. In view of the urgency of the case, Paraguay also requested the Court to indicate provisional measures to the effect that the United States should refrain from executing Mr. Breard before the Court could consider Paraguay's claims. Paraguay made clear that it does not seek the release of Mr. Breard.

In the reasoning leading to its decision, the Court finds that the execution of Mr. Breard "would render impossible the ordering by the Court of the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims".

The Court nevertheless points out that the issues before it "do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes" and recalls that its function is "to resolve international legal disputes between States . . . and not to act as a court of criminal appeal".

It states that "it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition".

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The Court had established at the outset that a dispute exists prima facie between the Parties as to the application of the Vienna Convention and that it has jurisdiction prima facie to examine it. Paraguay and the United States are both parties to the Vienna Convention and to its Optional Protocol concerning the Compulsory Settlement of Disputes, Article I of which provides that"disputes arising out of the

Compulsory Settlement of Disputes, Article I of which provides that"disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".

Further proceedings

Vice-President Weeramantry will soon convene a meeting with the Parties to consult them on the subsequent procedure. The Vice-President of the Court exercises the functions of the presidency in the case, as the President is a national of the United States.

After the Parties' views have been ascertained, time-limits will be fixed for the filing of written pleadings.

The Court was composed as follows in the case: Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

President Schwebel, and Judges Oda and Koroma appended declarations to the Order.

The text of the declarations (in their original language) can be found in an Annex to this press release.

The full text of the Order and of the declarations (in their original language) is already available on the Court's Website (**http://www.icj-cij.org**).

A summary of the Order will be available later.

The printed text of the Order and of the declarations appended to it will become available in due course (orders and enquiries should be addressed to the Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10; to the Sales Section, United Nations, New York, N.Y. 10017; or any appropriate specialized bookshop).

Information Office:

Mr. Arthur Witteveen, Secretary of the Court (tel: 31-70 302 2336)

Mrs. Laurence Blairon, Information Officer (tel: 31-70 302 2337)

Annex to Press Communiqué No. 98/17

Declaration of President Schwebel

I have voted for the Order, but with disquiet. The sensitive issues it poses have been hastily, if ably, argued. The evidence introduced is bare. The Court's consideration of the issues of law and fact, in the circumstances imposed upon it, has been summary. The United States maintains that no State has ever before claimed as Paraguay now does that, because of lack of consular access under the Vienna Convention on Consular Relations, the results of a trial, conviction, and appeal should be voided. Not only has the United States apologized to Paraguay for the unintentional failure of notification to Paraguay's consul of the arrest and trial of the accused, but it has taken substantial steps to strengthen what appears to be a practice in the United States of variable compliance with the obligations imposed upon it by the Vienna Convention.

All this said, I have voted for the Order indicating provisional measures suggested pursuant to

All this said, I have voted for the Order indicating provisional measures suggested pursuant to Article 41 of the Statute of the Court. Those measures ought to be taken to preserve the rights of Paraguay in a situation of incontestable urgency.

I have so voted essentially for these reasons. There is an admitted failure by the Commonwealth of Virginia to have afforded Paraguay timely consular access, that is to say, there is an admitted breach of treaty. An apology and Federal provision for avoidance of future such lapses does not assist the accused, who Paraguay alleges was or may have been prejudiced by lack of consular access, a question which is for the merits. It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Declaration of Judge Oda

1. I voted in favour of the Court's Order with great hesitation as I believed and I still believe that the request for the indication of provisional measures of protection submitted by Paraguay to the Court should have been dismissed. However, in the limited time - one or two days - given to the Court to deal with this matter, I have found it impossible to develop my points sufficiently to persuade my colleagues to alter their position.

2. First of all, I would like to express some of my thoughts in connection with this request.

I can, on humanitarian grounds, understand the plight of Mr. Breard and recognize that owing to the fact that Paraguay filed this request on 3 April 1998, his fate now, albeit unreasonably, lies in the hands of the Court.

I would like to add, however, that, if Mr. Breard's rights as they relate to humanitarian issues are to be respected then, in parallel, the matter of the rights of victims of violent crime (a point which has often been overlooked) should be taken into consideration. It should also be noted that since his arrest, Mr. Breard has been treated fairly in all legal proceedings within the American judicial system governed by the rule of law.

The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of habeas corpus. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters.

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3. As stated earlier, Paraguay's request was presented to the Court on 3 April 1998 in connection with and at the same time as its Application instituting proceedings against the United States for violations of the 1963 Vienna Convention on Consular Relations. Paraguay's Application was unilaterally submitted to the Court on the basis of the Optional Protocol. I very much doubt that, on the date of filing of the Application and the request, there was any "dispute[s] arising out of the interpretation or application of the [Vienna] Convention" (Optional Protocol, Article I).

If there was any dispute between Paraguay and the United States concerning the interpretation or application of the Vienna Convention, it could have been that the United States was presumed to have violated the Convention at the time of the arrest of Mr. Breard in 1992, as the United States did not inform the Paraguayan consul of that event.

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This issue was raised by Paraguay when it became aware of Mr. Breard's situation. In 1996, negotiations took place between Paraguay and the United States concerning the consular function provided for under the Convention. In July 1997, the United States proceeded to remedy the

provided for under the Convention. In July 1997, the United States proceeded to remedy the violation by sending a letter to the Government of Paraguay apologizing for its failure to inform the consul of the events concerning Mr. Breard and giving an assurance that this failure would not be repeated in future. In my view, the United States was thus released from its responsibility for violation of the Vienna Convention.

From that time, the question of violation of the Vienna Convention, which may have led to a dispute concerning its application and interpretation, no longer existed. However, this question was raised once more on 3 April 1998, the date on which Paraguay's Application was filed.

4. What did Paraguay ask the Court to decide in its Application of 3 April 1998? Paraguay asked mainly for a decision relating to Mr. Breard's personal situation, namely, his pending execution by the competent authorities of the State of Virginia.

Paraguay requested restitutio in integrum. However, if consular contact had occurred at the time of Mr. Breard's arrest or detention, the judicial procedure in the United States domestic courts relating to his case would have been no different. This point was made clear in the pleadings of both Parties.

* *

5. I would like to turn to some general issues relating to provisional measures. First, as a general rule, provisional measures are granted in order to preserve rights exposed to imminent breach which is irreparable and these rights must be those to be considered at the merits stage of the case, and must constitute the subject-matter of the Application or be directly related to it. In this case, however, there is no question of such rights (of States parties), as provided for by the Vienna Convention, being exposed to an imminent irreparable breach.

6. Secondly, in order that provisional measures may be granted by the Court, the Court has to have, at the very least, prima facie jurisdiction to deal with the issues concerning the rights of the States parties. However I believe that, as regards the present request for provisional measures, the Court does not even have prima facie jurisdiction to handle this matter.

7. Thirdly, if the request in the present case had not been granted, the Application itself would have become meaningless. If that had been the case, then I would have had no hesitation in pointing out that the request for provisional measures should not be used to ensure that the main Application continue. In addition the request for provisional measures should not be used by applicants for the purpose of obtaining interim judgments that would affirm their own rights and predetermine the main case.

8. I have thus explained why I formed the view that, given the fundamental nature of provisional measures, those measures should not have been indicated upon Paraguay's request.

I reiterate, however, that I voted in favour of the Order, for humanitarian reasons, and in view of the fact that, if the execution were to be carried out on 14 April 1998, whatever findings the Court might have reached might be without object.

Declaration of Judge Koroma

My decision to vote in favour of the Order granting the interim measures of protection in this matter was reached only after careful consideration and in the light of the urgency and exceptional circumstances of this case. Torn as I was between the need to observe the requirements for granting provisional measures of protection under Article 41 of the Statute of the Court, thereby ensuring that whatever decision the Court might reach should not be devoid of object, and the need for the Court to comply with its jurisdiction to settle disputes between States which, in my view, includes respect for the sovereignty of a State in relation to its criminal justice system.

It was, therefore, both propitious and appropriate, for the Court to bear in mind its mission which is to decide disputes between States, and not to act as a universal supreme court of criminal appeal. On the other hand, it is equally true that the Court's function is to decide disputes between States which are submitted to it in accordance with international law, applying international conventions, etc. The Order, in my judgement, complies with these requirements.

Paraguay's Application, filed on 3 April 1998 instituting proceedings against the United States for purported violations of the 1963 Vienna Convention on Consular Relations, inter alia, requested the Court to grant provisional measures of protection under Article 41 of the Statute so as to protect its rights and the right of one of its nationals who had been convicted of a capital offence committed in the United States and sentenced to death.

The purpose of a request for provisional measures is to preserve as well as to safeguard the rights of the parties that are in dispute, especially when such rights or subject matter of the dispute could be irretrievably or irreparably destroyed thereby rendering the Court's decision ineffective or without object. It is in the light of such circumstances that the Court has found it necessary to indicate interim measures of protection with the aim of preserving the respective rights of either party to the dispute. But prior to this, the applicant State has the burden of indicating that prima facie, the Court has jurisdiction.

When the facts presented were considered by the Court in the light of the Vienna Convention on Consular Relations, in particular in relation to its Articles 5 and 36, and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963, the Court reached the correct conclusion that a dispute existed and that its jurisdiction had been established prima facie.

In my view, in granting this Order, the Court met the requirements set out in Article 41 of the Statute, whilst at the same time the Order preserves the respective rights of either party - Paraguay and the United States. The Order called for the suspension of the sentence of execution of Mr. Breard on 14 April 1998, thereby preserving his right to life pending the final decision of the Court on this matter, and also recognized the United States' criminal sovereignty in matters such as charging, trying, convicting and sentencing suspects as appropriate, within the United States or its jurisdiction. I concur with this finding.

In reaching this decision, the Court has also acted with the necessary judicial prudence in considering a request for interim measures of protection, in that it should not deal with issues which are not immediately relevant for the protection of the respective rights of either party or which are for the merits. It also thus, once again confirmed its consistent jurisprudence that a provisional measure of protection should only be granted where it is indispensable and necessary for the preservation of the respective rights of either party and only with circumspection. It was in the light of the foregoing consideration, that I joined the Court in granting the request under Article 41 of the Statute.

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Trial: Paraguay asks court to prevent execution

Man was guilty, U.S. says, even if Paraguay never knew of his case

BY LAURA LaFAY
STAFF WRITER

Angel Francisco Breard, the Paraguayan citizen scheduled to be executed in Virginia next week, is guilty of rape and murder and would have been sentenced to death whether or not his country's embassy had been notified of his predicament, lawyers for the United States argued in the International Court of Justice Tuesday.

Breard, who was sentenced to death for killing an Arlington woman in 1992, is at the center of an unprecedented international legal fight between the United States and his native country, The Republic of Paraguay.

That fight was articulated Tuesday in a courtroom in The Hague, Netherlands, where lawyers for both sides argued before the

Please see **Trial,** *Page A7* ◆

Continued from Page A1

judicial arm of the United Nations, also known as the World Court.

The United States maintains that Virginia has a right to execute Breard for his crime. Paraguay contends it does not.

Virginia officials obtained Breard's death sentence in violation of the Vienna Convention on Consular Relations, argued lawyers for the South American republic. The Vienna Convention is an international treaty that requires consular notification whenever one country arrests and detains a citizen of another.

Had Paraguayan counsel been notified of Breard's predicament, the lawyers contend, Breard would have been advised to accept an Arlington prosecutor's offer of a life sentence in exchange for a guilty plea.

Breard instead went to trial, took the stand and confessed, claiming a satanic curse placed on him by his father-in-law had caused him to commit the crime.

The United States has conceded that no one told Breard he could contact the Paraguayan consul for legal help, and no one told the consul about Breard's arrest.

Doesn't matter, State Department lawyers argued Tuesday.

Nobody *prevented* Breard from contacting his embassy. He had court-appointed lawyers, spoke English well, and "unquestionably committed the offenses for which he was tried."

Furthermore, "Virginia officials have advised us that no actual offer of a plea agreement was ever made. . . . Thus Paraguay's assumption that Mr. Breard could have avoided the death penalty through a plea bargain does not withstand scrutiny," State Department lawyer Catherine Brown told the court. Her statement contradicted affidavits from Breard's court-appointed lawyers, who said there was an offer.

Paraguay wants the World Court to issue what the court calls a "provisional measure" preventing the United States from executing Breard while it considers what to do about the treaty violation.

"Paraguay does not contend that Mr. Breard is not subject to retrial or to future prosecution," Donald Francis Donovan, a lawyer for Paraguay, told the court.

"The fundamental contention of Paraguay is that in any such retrial, Paraguay's rights and Mr. Breard's rights under the Vienna Convention must be respected."

But what about the rights of the United States and Virginia? asked the three State Department lawyers who argued for the United States.

"Provisional measures should not protect the rights of one party while disregarding the rights of the other," said John Crook, assistant legal adviser for United Nations Affairs.

"Paraguay has made clear its goal here is to prevent the operation of the criminal laws of the commonwealth of Virginia . . . This would significantly impair the rights of the United States to the orderly and conclusive functioning of its criminal justice system."

The American lawyers also argued that the World Court has no jurisdiction over the Breard matter because its function is to settle treaty disputes between participating nations.

There is no dispute between Paraguay and the United States, said the lawyers, because the United States has acknowledged and apologized for ignoring the Vienna Convention in the Breard case.

In addition, they argued, the World Court would set a dangerous precedent if it interfered in a U.S. criminal matter. It would set itself up as a "supreme court of criminal appeals" for those punished and imprisoned in foreign countries.

"Once the court opens itself to this process, it can be expected that a great many defendants will press the (countries) of their nationality to take recourse to it," said Michael Matheson, deputy legal adviser in the case.

Such a situation would present problems for the United States. According to Amnesty International, there are 71 foreign nationals on American death rows, and another 20,000 in state and federal prisons.

The court is expected to announce its decision Thursday. Breard's execution is set for April 14.

Uncorrected

Non-corrigé

CR 98/7

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1998

Public sitting

held on Tuesday 7 April 1998, at 10 a.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America)

Request for the Indication of Provisional Measures

VERBATIM RECORD

ANNEE 1998

Audience publique

tenue le mardi 7 avril 1998, à 10 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président, faisant fonction de président

en l'affaire de l'Application de la convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique)

Demande en indication de mesures conservatoires

COMPTE RENDU

Present:	Vice-President	Weeramantry, Acting President	*Présents :*	M.	Weeramantry, vice-président, faisant fonction de président en l'affaire
	President	Schwebel		M.	Schwebel, président
	Judges	Oda		MM.	Oda
		Bedjaoui			Bedjaoui
		Guillaume			Guillaume
		Ranjeva			Ranjeva
		Herczegh			Herczegh
		Shi			Shi
		Fleischhauer			Fleischhauer
		Koroma			Koroma
		Vereshchetin			Vereshchetin
		Higgins		Mme	Higgins
		Parra-Aranguren		MM.	Parra-Aranguren
		Kooijmans			Kooijmans
		Rezek			Rezek,
	Registrar,	Valencia-Ospina		M.	Valencia-Ospina, greffier

The Government of the Republic of Paraguay is represented by:

H. E. Mr. Manuel María Cáceres, Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands, Brussels,

as Agent;

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Barton Legum, Debevoise & Plimpton, New York,

Mr. Don Malone, Debevoise & Plimpton, New York,

Mr. José Emilio Gorostiaga, Professor of Law at the University of Paraguay in Asunción and Legal Counsel to the Office of the President of Paraguay,

as Counsel and Advocates.

Le Gouvernement de la République du Paraguay est représenté par:

S. Exc. M. Manuel María Cáceres, ambassadeur du Paraguay au Royaume de Belgique et au Royaume des Pays-Bas, à Bruxelles,

comme agent;

M. Donald Francis Donovan, membre du cabinet Debevoise et Plimpton, New York,

M. Barton Legum, membre du cabinet Debevoise et Plimpton, New York,

M. Don Malone, membre du cabinet Debevoise et Plimpton, New York,

M. José Emilio Gorostiaga, professeur de droit à l'Université du Paraguay à Asunción et conseiller juridique de la Présidence du Paraguay,

comme conseils et avocats.

The Government of the United States of America is represented by:

Mr. David R. Andrews, Legal Adviser, United States Department of State,

as Agent;

Mr. Michael J. Matheson, Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, United States Department of State

Ms. Catherine Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State

as Counsel and Advocates;

Mr. Sean D. Murphy, Legal Counsellor, United States Embassy, The Hague,

Mr. Robert J. Ericson, United States Department of Justice,

as Counsel.

Le Gouvernement des Etats-Unis d'Amérique est représenté par:

M. David R. Andrews, conseiller juridique du département d'Etat des Etats-Unis,

comme agent;

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat des Etats-Unis,

comme coagent;

M. John R. Crook, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis,

Mme Catherine Brown, conseiller juridique adjoint chargé des affaires consulaires au département d'Etat des Etats-Unis,

comme conseils et avocats;

M. Sean D. Murphy, conseiller juridique à l'ambassade des Etats-Unis, La Haye,

M. Robert J. Ericson, du département de la justice des Etats-Unis,

comme conseils.

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today, pursuant to Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the request for the indication of provisional measures submitted by the Republic of Paraguay in the case concerning the *Application of the Vienna Convention on Consular Relations* (*Paraguay* v. *United States of America*).

Article 32, paragraph 1, of the Rules of Court provides that, if the President of the Court is a national of one of the parties to a case, he shall not exercise the functions of the presidency in respect of that case. The President of the Court, Judge Schwebel, will therefore not be exercising the functions of the presidency in this case and it falls to me, in my capacity as Vice-President of the Court, to do so, in accordance with Article 13 of the Rules of Court.

The proceedings were instituted on 3 April 1998 by the filing in the Registry of the Court of an application by the Government of the Republic of Paraguay against the United States of America. In that Application, the Government of Paraguay refers, as a basis for the Court's jurisdiction, to Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on

Consular Relations of 24 April 1963.

Paraguay claims that the United States has acted in violation of obligations owed to Paraguay under Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations. It contends that,

> "In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death"

and asks the Court for *restitutio in integrum,* or

> "the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention".

I will now ask the Registrar to read out the decision requested of the Court, as formulated in paragraph 25 of the Application of Paraguay:

The REGISTRAR:

> "The Republic of Paraguay asks the Court to adjudge and declare:
>
> (1) that the United States, in arresting, trying, convicting and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;
>
> (2) that Paraguay is therefore entitled to *restitutio in integrum*;
>
> (3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and
>
> (4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;
>
> and that, pursuant to the foregoing international legal obligations,
>
> (1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
>
> (2) the United States should restore the *status quo ante*, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and
>
> (3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts."

The VICE-PRESIDENT: Thank you. Immediately after the filing of the Application, on 3 April 1998, the Agent of Paraguay filed in the Registry of the Court a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. Paraguay stated, in that request, that

> "By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on 14 April 1998, pursuant to Virginia Code ð 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead."

Paraguay further indicated that

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour."

It asked the Court to treat the matter as one of "the greatest urgency" in view of "the extreme gravity and immediacy of the threat".

I will now ask the Registrar to read out the provisional measures which the Agent of Paraguay, in paragraph 8 of the request, asks the Court to indicate.

The REGISTRAR:

> "On behalf of the Government of Paraguay I therefore respectfully request that, pending final judgment in this case, the Court indicate:
>
> *(a)* That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;
>
> *(b)* That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and
>
> *(c)* That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case."

The VICE-PRESIDENT: Immediately upon the filing of the Request, the certified copy of the Request for the indication of provisional measures to which reference is made in Article 73, paragraph 2 of the Rules of Court, was transmitted to the Government of the United States.

Immediately upon the filing of the Request, letters were sent by the Vice-President of the Court to each of the Parties, pursuant to Article 74, paragraph 4, of the Rules of Court, drawing their attention to the need to act in such a way as to enable any Order the Court might make on the request for provisional measures to have its appropriate effects.

According to Article 74 of the Rules of Court, a request for the indication of provisional measures "shall have priority over all other cases" and if the Court is not sitting when the request is made, it is to be

convened forthwith for the purpose of proceeding to a decision on that request. Moreover, the date of the oral proceedings must be fixed in such a way as to afford the Parties the opportunity of being represented at it. Consequently, following a meeting held between the Vice-President and the representatives of both Parties on the date the request was filed, the Parties were informed that the date for the oral proceedings contemplated by Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the request for the indication of provisional measures, had been fixed as 7 April 1998 at 10 a.m.

I note the presence in Court of Agents and Counsel of the two Parties. The Court will first hear the Republic of Paraguay, the Applicant on the merits and the State which has requested the indication of provisional measures. I accordingly give the floor to His Excellency Mr. Manuel Cáceres, Agent of Paraguay.

Mr. CACERES:

1. Introduction

Mr. President, Mr. Vice-President and distinguished Members of the Court. My name is Manuel María Cáceres. I am the Agent for the Government of the Republic of Paraguay in this case.

2. Attempts to Resolve Dispute

Paraguay recognizes the busy schedule of this Court. Paraguay therefore deeply appreciates the Court's willingness to convene on this request for provisional measures on such short notice.

Paraguay further recognizes that, given its national, Angel Francisco Breard, is scheduled to be executed exactly one week from today, the Court must act with great alacrity if its decision on Paraguay's request for provisional measures is to have any effect. Again, Paraguay deeply appreciates the deliberative efforts that the Court and its Members will now be required to devote to our request.

I therefore wish to assure the Court that Paraguay has filed this Application and asserted this request for provisional measures only after exhaustive efforts to resolve this dispute without intervention of this Court. As detailed in Paraguay's Application, Paraguay has attempted to resolve the dispute not only through diplomatic negotiations, but also by taking the unusual step of pursuing relief through the municipal court system of the United States of America. None of these avenues has proved fruitful.

Just last week, Paraguay and the United States resumed efforts in the form of a series of high-level meetings in Asunción, which both parties hoped would make it possible to avoid recourse to this Court.

To our regret, however, no resolution has been achieved. Thus, as the Court knows, we initiated proceedings last Friday and have asked the Court to indicate provisional measures that will ensure that Paraguay's national is not executed during the pendency of these proceedings.

3. Introduction of Counsel

To make Paraguay's oral submission in support of its Application for provisional measures, I now introduce Professor José Emilio Gorostiaga, Professor of Law at the University of Paraguay and Legal Counsel to the Office of the President of Paraguay. I also introduce Mr. Donald Francis Donovan of Debevoise & Plimpton in New York, and Mr. Barton Legum also of Debevoise & Plimpton in New York and Mr. Don Malone as well of the same law firm.

Mr. Donovan will commence our oral submissions.

The VICE-PRESIDENT: Thank you. Mr. Donovan, please.

Mr. DONOVAN:

II. SUMMARY, TREATIES, AND JURISDICTION

1. Introduction and Summary

Mr. President, Mr. Vice-President, and distinguished Members of the Court.

We are acutely aware of the time pressure under which the Court takes up this matter in light of the scheduled execution of Angel Francisco Breard, Paraguay's national, on 14 April, this coming Tuesday. In our scheduling meeting on Friday, the Court made it clear that it wished us to keep our oral submissions as brief as possible, and if at all possible to no more than one hour. We will certainly respect that request.

This case facilitates a succinct submission as it arrives at this Court, the case presents a straightforward dispute both as a matter of the underlying facts and of the governing principles of law. We believe as well that the circumstances relevant to our request for provisional measures — most importantly, of course, the impending execution — are also plain to see. Accordingly, we are confident that the need for real expedition in this matter will not in any way compromise the Parties' opportunity to present their observations to the Court.

I will begin Paraguay's oral submissions by setting forth the treaty provisions from which Paraguay's claims arise and the jurisdictional basis for those claims.

My colleague Mr. Legum will then set forth the facts out of which the claims arise.

I will then address the Application for provisional measures in light of the present posture of the dispute.

And finally, Dr. Gorostiaga will briefly elaborate on the importance Paraguay attaches to the interests at stake in this matter.

2. Substantive Treaty Rights at Issue

Paraguay bases its Application in this Court on the Vienna Convention on Consular Relations, to which both Paraguay and the United States are parties. The Convention, as this Court well knows, is the modern cornerstone of consular rights and privileges, but it is a cornerstone that rests on centuries of accumulated experience.

Article 5 *(e)* of the Vienna Convention includes protecting the interests of a sending State's nationals and providing consular assistance to nationals of the State as among the consular functions protected by the Convention.

Article 36 implements certain provisions of Article 5 *(e)* in the case of detained nationals. Paragraph 1 of Article 36 provides a detailed procedural mechanism to be followed in all cases where a national is detained by another State party.

Subparagraph *(a)* of paragraph 1 establishes the guiding principle of free consular access — that is, consular officers of the sending State must have free access to and communication with nationals of that State, and nationals must have free access to and communication with their consular officers. That is the very basis of the means by which consular assistance is provided.

Subparagraph *(b)* establishes the precise procedure to be followed when a national of the sending State is detained by the competent authorities of the receiving State. Specifically, the authorities of the receiving

State must "without delay" inform the national of his or her right to consular assistance and to have the consul advised of the detention. Further, if the national so requests, the authorities must "without delay" inform the consular post of the sending State. Finally, any communication by the national to the consular post must be forwarded to the authorities, again "without delay".

Subparagraph *(c)* describes the consular officers' procedural rights with respect to detained nationals. They have the right to visit and to correspond and to converse and to arrange for legal representation.

Paragraph 2 of Article 36 provides that all of these rights "shall be exercised in conformity with the laws and regulations of the receiving State". That provision, however, is subject to the proviso that "the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended". Thus, while States have the authority to regulate the means by which consular rights are exercised, the municipal laws and regulations cannot operate to deprive the consular officers or the national of the rights granted; to the contrary, the proviso — which was adopted over an alternative that would have permitted substantial dilution of the rights granted by way of municipal law requirements — makes clear that the municipal laws must ensure that "full effect" be given to such rights.

I should point out that Article 36 in Paraguay's view creates rights not only for the State party, but also for the detained national.

And as the Court will have noted, Paraguay in this case seeks redress for both categories of rights. It brings the action on its own behalf for violations of rights owed to it, and it also brings the action in the exercise of diplomatic protection in light of the breach of duties owed to its national.

3. Jurisdiction

Finally, the Vienna Convention includes an Optional Protocol, again to which both Paraguay and the United States are parties.

Article I of the Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction" of this Court, the Application may be brought by any party to the dispute being a party to the Protocol.

I will address jurisdiction more fully after Mr. Legum has advised the Court of the relevant facts. For the moment, I simply wish to point out that Paraguay founds jurisdiction in this case on Article I of the Optional Protocol.

I turn now to Mr. Legum.

The VICE-PRESIDENT: Thank you, Mr. Donovan. Mr. Legum, please.

Mr. LEGUM:

III. FACTS

1. Introduction

Mr. President, Mr. Vice-President and distinguished Members of the Court. I will this morning summarize the facts and proceedings in the United States concerning the case of Angel Francisco Breard.

2. The Crime and the Arrest

Mr. Breard is a Paraguayan national. In 1986, at the age of 20, he left Paraguay to reside in the United States.

On 1 September 1992, Mr. Breard was arrested by law enforcement authorities of the Commonwealth of Virginia, one of the States of the United States. Mr. Breard was suspected to have raped and murdered a Virginia woman named Ruth Dickie.

Neither at the time Mr. Breard was arrested, nor at any point thereafter, did Virginia law enforcement authorities inform him of his right to receive consular assistance from the Paraguayan consulate. Nor did they ever advise the Paraguayan consulate of his detention. Neither the Virginia authorities nor the United States contend otherwise.

The Virginia authorities did not provide Paraguay the opportunity to consult with Mr. Breard and arrange for appropriate legal representation. Instead, the Virginia court itself appointed counsel for Mr. Breard. The lawyers appointed by the court were familiar with the Virginia criminal justice system. They had no familiarity, however, with the justice system or culture of Paraguay and were not equipped to address misconceptions concerning the functioning of the American justice system that a Paraguayan national might be expected to have.

3. The Trial and Sentence

Virginia brought Mr. Breard to trial and determined to seek the death penalty.

As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the course of the criminal proceedings against him.

Perhaps most important, he rejected a plea offer that the Virginia authorities made before trial. The Virginia authorities offered to recommend a sentence of life imprisonment if Mr. Breard would plead guilty to the charges against him. Against the advice of his court-appointed attorneys, Mr. Breard rejected that offer.

Instead, Mr. Breard waived his right not to incriminate himself, took the witness stand and confessed to the murders. These actions ruled out any possibility that Mr. Breard would receive an acquittal and subjected him to one of three possible penalties under Virginia law: life imprisonment, life imprisonment with a $100,000 fine against him or the death penalty.

Therefore, in rejecting the plea offer and confessing at trial, Mr. Breard exposed himself to the risk of a death sentence without any possibility of receiving a lighter sentence than what the Virginia authorities had offered to him in the plea offer before trial.

Mr. Breard's decision to confess and reject the plea offer was based on a misunderstanding of the United States justice system and how it differed from the Paraguayan justice system. Where a confession at trial might appeal to the mercy of a Paraguayan court, such a confession in the Virginia trial served only to seal Mr. Breard's fate.

Paraguayan consular officers are familiar with the characteristics of both justice systems, understand the misconceptions of Paraguayan nationals about the United States justice system and are skilled in explaining the differences in terms that Paraguay nationals can understand. Had a Paraguayan consular officer been permitted to assist Mr. Breard, the officer would have provided Mr. Breard with information that would have enabled him to make more informed decisions in the conduct of his defence.

Even with Mr. Breard's confession at trial, the jury found it a close question whether to apply the death penalty. The jury transmitted a note to the trial judge enquiring whether it could sentence Mr. Breard to life in prison and at the same time recommend that he not be released on parole. Because such a sentence was not provided for under Virginia law at the time, the judge did not respond to the note.

At the conclusion of the 1993 trial, the jury found Mr. Breard guilty of the murder, and he was sentenced to death. Had he had the assistance of Paraguayan consular officers, that result would have been different, at least with respect to the sentence.

4. Post-Conviction

Mr. Breard appealed his conviction and sentence to Virginia's appellate courts. His appeals were denied. He also petitioned the state courts of Virginia for relief from his detention by way of a writ of *habeas corpus*. That petition was also denied.

In sum, Mr. Breard was detained, tried, convicted, sentenced to death and had exhausted all of the remedies available to him in the state courts of Virginia without ever receiving the notification and consular assistance to which he was entitled under Article 36 of the Vienna Convention.

In the spring of 1996, without benefit of information from the authorities of Virginia and the United States, Paraguay finally learned that Mr. Breard was imprisoned in Virginia and awaiting execution. Paraguayan and consular officers immediately began rendering assistance to Mr. Breard. At the time Paraguay first contacted Mr. Breard, he was entirely unaware of his rights under the Vienna Convention. He was unaware of those rights precisely because the authorities of the United States had failed to comply with their obligation to notify him of his rights under the Vienna Convention.

In late August 1996, Mr. Breard took the final step available to him for challenging his conviction and sentence: filing a petition for a writ of *habeas corpus* in a federal court of first instance. For the first time, Mr. Breard raised violations of the Vienna Convention.

In November 1996, the federal court of first instance denied Mr. Breard's petition for *habeas corpus*. The court held under the municipal law doctrine of procedural default, Mr. Breard could not assert the violations of the Vienna Convention as a basis relief in the federal *habeas* proceedings because he had not done so in his prior legal proceedings.

The court held the doctrine to bar his Vienna Convention claims even though he had failed to raise those claims not through any choice on his part, but rather because the Virginia authorities had failed to notify him of his rights as required by the Convention.

The intermediate federal appellate court affirmed the lower court's decision on 22 January 1998. This affirmance exhausted all of the municipal law remedies available to Mr. Breard as a matter of right.

In light of the exhaustion of such remedies, by order dated 25 February 1998 the Virginia court that had sentenced Mr. Breard set an execution date of 14 April 1998.

Mr. Breard is scheduled to be moved on Friday 10 April 1998, from the maximum security prison where he is currently incarcerated to the facility in another town of Virginia where the execution chamber is housed. Absent intervention, at 9 p.m. one week from today Virginia will, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead" (Va. Stat. Ann. ð 53.1 234).

5. Breard's Petition to the Supreme Court

Mr. Breard has now petitioned the United States Supreme Court for a writ of certiorari and requested a stay of his execution.

Several aspects of the procedure in the Supreme Court are important to understand.

First, review in the Supreme Court is not a matter of right but is a matter of discretion rarely exercised. Less than five percent of all petitions for certiorari are granted. The situation is no different in cases involving the death penalty: prisoners facing execution routinely petition the Court and request a stay, and the Court routinely denies.

Second, in cases involving an imminent execution, the Supreme Court typically does not rule on the petition and request for a stay of execution until shortly before the scheduled execution. Often the decision is communicated telephonically to the petitioner a few hours before the execution.

I now turn to Mr. Donovan to set forth Paraguay's Application for provisional measures.

The VICE-PRESIDENT: Thank you Mr. Legum. Mr. Donovan please.

Mr. DONOVAN:

IV. NEED FOR PROVISIONAL MEASURES

Paraguay asks this Court to direct the United States to ensure that Mr. Breard is not executed until the Court has had the opportunity to rule on Paraguay's claims under the Vienna Convention as presented in its Application instituting proceedings. In Paraguay's view, the impending execution of Mr. Breard on the basis of a criminal proceeding that it is acknowledged by the competent authorities of the United States did not comply with the requirements of the Vienna Convention establishes the need for provisional measures in this case with unusual clarity.

I will set forth Paraguay's Application in four steps. First, I will demonstrate the Court's jurisdiction. Second, we will discuss the relationship of the provisional measures sought to the rights Paraguay seeks to vindicate in this matter in order to show that the measures sought are the minimum necessary to preserve the possibility of an effective final judgment. Third, we will describe the circumstances that establish the urgency of the Application, and finally, I will set forth the basis of Paraguay's claim that it faces irreversible damage.

First, the matter Paraguay brings to this Court is plainly a "dispute arising out of the interpretation or application of the Convention". As Mr. Legum explained, neither the United States nor the competent authorities of the Commonwealth of Virginia have ever suggested that Virginia officials complied with Article 36 of the Vienna Convention when they prosecuted Mr. Breard for capital murder. Paraguay has sought relief for the violation from the United States for the past 18 months, both through diplomatic channels and — although it was under no obligation to do so — through the municipal court system in the United States.

The United States, however, has taken no steps to remedy the violation. In particular, the United States has taken no steps to halt the impending execution of Paraguay's national on the basis of a conviction and sentence obtained in violation of the Convention. As a result, the parties have a dispute within Article I of the Optional Protocol, and the Court is competent to hear Paraguay's Application.

The Court's authority to go forward on this Application for provisional measures becomes even clearer when one takes into account the principle, which this Court has stated on numerous occasions, that on an application for provisional measures the Court need not finally satisfy itself of its jurisdiction but may — given the very nature of provisional measures — proceed on the basis of a prima facie showing. Paraguay respectfully submits that the existence prima facie of jurisdiction under Article I is clear.

Second, the provisional measures Paraguay seeks are appropriate in light of its claims. Specifically, the measures Paraguay seeks are both *conservatory* and *conservative*.

This Court has often stated that the objective of provisional measures must be to "preserve the respective rights of the parties pending the decision of the Court". Here, Paraguay claims, a violation of Article 36 of the Vienna Convention. Paraguay claims that it suffered injury from that violation in the form of a conviction rendered against, and sentence of death imposed upon, its national.

To remedy the violation, Paraguay seeks restitution in kind and an order of non-repetition.

As to restitution, in the classic formulation of the Chorzow Court, the author of an internationally wrongful act has an obligation "as far as possible, [to] wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". Article 43 of the ILC's Draft Articles on State Responsibility is to similar effect. In its formulation the injured State is entitled to "the re-establishment of the situation which existed before the wrongful act was committed".

In this case, the re-establishment of the prior situation will require an order against the enforcement of the conviction and sentence. It may also require for example, an order directing that the plea offer which would have permitted Mr. Breard to avoid the death sentence be reconveyed. Obviously, no such orders could have any effect if Virginia has executed Mr. Breard in the meantime.

Likewise, as to non-repetition, Paraguay will seek an order requiring the United States to ensure compliance with the Vienna Convention should Virginia choose to retry Mr. Breard, as Paraguay expects it would. That order, too, would be useless if Mr. Breard has been executed.

Clearly, then, an order directing the United States to ensure that Mr. Breard is not executed during the pendency of this proceeding is necessary to preserve Paraguay's rights in the controversy.

The Court has also stated that provisional measures should not "anticipate" the Court's judgment on the merits. As an initial matter, I should note that the relief that Paraguay seeks on the merits in this case is carefully restrained. Paraguay does not contend that Mr. Breard is not subject to re-trial or to future prosecution for the acts with which he was charged. The fundamental contention of Paraguay is that in any such re-trial Paraguay's rights and Mr. Breard's rights under the Vienna Convention must be respected. Likewise, the provisional measures that Paraguay seeks are carefully limited and in no way anticipate a judgment. Paraguay does not ask, for example, that Mr. Breard be afforded a new trial at this time, or that his conviction and sentence be in any way affected except that the death sentence — the execution — be provisionally suspended. Mr. Breard will remain in custody, and if the United States prevails on the merits in this case, Virginia will be able to go forward with the execution. Thus, the United States can complain of no harm if the Court orders the narrowly tailored provisional measures that Paraguay seeks.

Third, the Court has also said that provisional measures should issue only in situations of urgency. There can be no question of urgency here. As Mr. Legum has explained, neither Paraguay nor this Court can act on the assumption that the Supreme Court will grant a writ of certiorari or stay of the execution in Mr. Breard's case. As we have explained, Paraguay too has sought relief in the municipal courts of the United States. At the moment Paraguay too, in its own right and asserting only its own rights, also has a petition for certiorari pending before the United States Supreme Court and accompanying that petition it has filed an application for a stay of or injunction against the execution. But the same situation that Mr. Legum explained with respect to Mr. Breard's own petition obtains with respect to Paraguay's petition. We believe that the petition is compelling, but we must recognize that the Supreme Court grants very few petitions, and there is no possible way to predict in the case of any individual petition whether or not it will do so.

The nature of the provisional measures that are necessary here, considered in light of the constitutional structure of the United States, adds an additional element of urgency. The order of execution is an order of a State court, that of the Commonwealth of Viriginia. While the United States plainly has the ability to comply with any order the Court may issue by obtaining a stay of the Virginia court's order of execution, it will need to intervene with State authorities in order to do so, and it may, if it is so advised, choose to call upon a federal court. In other words, unlike some other situations, if the Court indicates provisional measures forbidding the execution, the federal executive branch to which any order would first be communicated will need to act affirmatively in order to bring the United States in compliance with that indication of provisional measures. It will not be sufficient for the United States, at least in the form of its federal executive branch, simply to refrain from taking certain action. For that reason there is

an additional need, with the greatest respect, for the Court to act quickly.

Finally, this Court has stated that the authority to grant provisional measures "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings". In other words, the Court has required a showing of irreparable injury or irreversible damage in some sense as a predicate to an indication of provisional measures. In Paraguay's view, I need not dwell on this requirement here. Needless to say, death is irreparable, irreversible and, in a very fundamental sense, irremediable. In considering requests from death-row prisoners for stays of their execution, the United States Supreme Court has held, without reservation, that in cases involving an execution, the equitable requirement of irreparable injury in seeking the equitable intervention of a stay or injunction is a given. Now that a death penalty case has reached this Court, it should be no different here.

The crimes with which Mr. Breard are charged deserve the most unequivocal condemnation. On the present state of affairs, individual states of the United States have the authority to express that condemnation in the form of the penalty of death. But even if the death penalty may still be lawfully imposed as a matter of sanction, courts entrusted to uphold the rule of law — on the international level no less than on the municipal level — must be vigilant to ensure the lawfulness, too, of the proceedings by which that penalty is imposed. To exercise that vigilance here, the Court must first indicate to the United States that it must ensure that Paraguay's national is not executed while this case is before the Court.

Dr. Gorostiaga will conclude Paraguay's submissions.

The VICE-PRESIDENT: Thank you, Mr. Donovan. Dr. Gorostiaga, please.

Mr. GOROSTIAGA:

V. CONCLUSIONS

Mr. Vice-President, Mr. President, and distinguished Members of the Court.

My colleagues have explained the importance of consular assistance in general. I wish very briefly to highlight the importance of consular assistance in this case in particular.

The United States is one of a relatively small group of countries that still impose the death penalty. Paraguay's Constitution, by contrast, expressly forbids the death penalty and guarantees the right to life.

The severity and irreversible nature of the death penalty greatly increase the importance of consular assistance in all cases in which it is sought. There is an enormous qualitative difference between a term of imprisonment and death: a case in which the death penalty is sought against a foreign national implicates to the maximum extent possible the foreign State's interest in protecting its nationals.

Such a case therefore brings into play in the most concrete and immediate way the sending State's right to provide consular assistance.

I wish to conclude by stating that Paraguay, of course, does not condone in any way the violent crime with which Mr. Breard was charged.

Further, Paraguay does not contest in any way the authority of the United States or its constituent entities to enforce its criminal laws with respect to this or any other crime committed within its jurisdiction.

Paraguay does contend, however, that the competent authorities of the United States must enforce its criminal laws by means that comport with the obligations undertaken by the United States in the Vienna Convention.

That was not done in the case of Angel Breard.

Paraguay today requests that this Court indicate provisional measures to ensure that the possibility will remain for Paraguay to exercise its rights under that Convention in Mr. Breard's case.

Thank you.

The VICE-PRESIDENT: Thank you Dr. Gorostiaga.

The Court will now adjourn for ten minutes and resume again to hear the submissions of the United States.

The Court adjourned from 11.00 to 11.15 a.m.

The VICE-PRESIDENT: Please be seated. The Court now resumes its sitting to hear the submissions of the United States of America.

Mr. ANDREWS: Thank you Mr. President, Members of the Court. Before I begin my presentation I would like to express the pleasure of the United States delegation at seeing Judge Kooijmans again sitting with the Court.

1.1. Mr. President, it is again an honour to appear before the Court, although I regret that it must be in a matter so hurried and involving facts so unhappy as those involved here.

1.2. As the Court well knows, Paraguay filed this case four days ago. Because of Paraguay's decision to file at such a late date, the Court decided to hold a hearing today on Paraguay's request for provisional measures. Out of our respect for the Court, we have of course come here urgently to participate in these proceedings. This morning, we will present our reasons why the Court should not indicate provisional measures. Given the extraordinary haste of these proceedings, however, our presentations will be less fully developed than we would like. We regret the unfortunate circumstances that have led to this expedited proceeding, which prejudices not just the United States, but the ability of the Court to consider the issues before it fully and fairly. We likewise regret the fact that Paraguay has chosen to disregard the two-month period provided in the Optional Protocol to the Vienna Convention for the possible resolution of such disputes through conciliation or arbitration.

1.3. The facts of the criminal indictment underlying this case are straightforward; indeed, we should all be clear that Mr. Breard unquestionably committed the offences for which he was tried. On 17 February 1992, Mr. Breard attempted to rape and then brutally murdered Ruth Dickie, a woman in Arlington, Virginia, a suburban jurisdiction across the Potomac River from Washington D.C. He was then arrested while attempting another rape. As we shall explain, genetic and other physical evidence linked Mr. Breard to the murder and the attempted rape. Indeed, ample evidence independent of his own testimony existed to prove that Mr. Breard committed these crimes. Mr. Breard was also implicated in a third sexual assault committed before he murdered Ms Dickie.

1.4. The Arlington police took Mr. Breard into custody and charged him with serious offences. The

Commonwealth of Virginia has stipulated in United States court proceedings that the "competent authorities" did not inform Breard that, as a national of Paraguay, he was entitled to have Paraguay's consul notified of his arrest. Under Article 36 of the Vienna Convention on Consular Relations, the police were obliged to tell Mr. Breard that the consul could be so notified.

1.5. Mr. Breard had lived in the United States since 1986 and speaks English well, he was appointed – experienced criminal defence counsel, and was able to maintain close and regular contact with friends and family. Given the circumstances and gravity of his crime, the jury recommended that he be sentenced to death, and the judge did so. Thereafter, Mr. Breard's attorneys brought a number of further actions in Virginia state courts and in United States courts seeking reversal of his conviction and sentence. This process has continued for almost five years, involving actions in different courts in the United States, including the United States Supreme Court, where Breard's request for certiorari — in other words, discretionary review by the Supreme Court — is still pending today.

1.6. As this Court knows, the indication of provisional measures is a serious matter which the Court is cautious in exercising. That is especially true in this case, where the Court is being asked to take action that would severely intrude upon the national criminal jurisdiction of a State in a matter of violent crime. Under the Court's jurisprudence, an applicant may only obtain the indication of provisional measures of protection in narrowly-defined circumstances, which the United States submits do not exist here.

1.7. The United States principal submission to the Court is that Paraguay has no legal recognizable claim to the relief it seeks and, for that reason, there is no prima facie basis for jurisdiction for the Court in this case, nor any prospect for Paraguay ultimately to prevail on the merits. Consequently, and in accordance with its jurisprudence, this Court should not indicate provisional measures of protection as requested by Paraguay.

1.8. Paraguay has no legally recognizable claim because Paraguay has no right under the Vienna Convention to have Mr. Breard's conviction and sentence voided. Paraguay in effect asks that this Court grant Mr. Breard a new trial — a right which would then presumably accrue to any other person similarly situated in the United States or in any other State which is a party to the Vienna Convention. The United States will show in these proceedings that this is not the consequence of a lack of notification under the Vienna Convention. The Court should not accept Paraguay's invitation to rewrite the Convention and to become a supreme court of criminal appeals.

1.9. Before describing the manner in which the United States will proceed in its presentation, I feel obliged to make a few comments about the issue of the death penalty in the United States. In a majority of the states of the United States (thirty-eight), including Virginia, voters have chosen through their freely elected officials to retain the death penalty for exceptionally grievous offences. Likewise, the United States itself authorizes the death penalty for exceptionally grievous federal offences. In practice, it is imposed, almost without exception, only for aggravated murder, as well as the case here. In all cases, the death penalty may be carried out only under substantive laws in effect at the time the crime was committed. All convictions and sentences involving the death penalty are subject to the extensive due process and equal protection requirements of the United States Constitution. They are also subject to exhaustive appeals at the state and federal levels, as has been the case with Mr. Breard.

1.10. When carried out in accordance with these safeguards, the death penalty does not violate international law. Capital punishment is not prohibited by customary international law or by any treaty to which the United States is a party. We recognize that some countries have abolished the death penalty under their domestic laws and that some have accepted treaty obligations to that effect. We respect their decisions. However, we also believe that in democratic societies, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people freely expressed and appropriately implemented by their elected representatives. Within the United States, legislative majorities nationally and in most of the constituent states have chosen to retain the option of capital punishment for the most serious crimes.

1.11. Many other countries likewise maintain capital punishment. On the same day that Paraguay filed this case, 3 April, the Commission on Human Rights in Geneva adopted a resolution that encouraged

States that have the death penalty to establish a moratorium on executions. This resolution passed, but by a sharply divided vote of 26 in favour and 13 against, with 12 abstaining. This action reflects the diversity of views held in the international community concerning capital punishment.

1.12. Capital punishment is not the issue in the dispute between the United States and Paraguay. The actual issues are quite different. They are very narrow. They relate to the Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties.

1.13. As is customary, Mr. President, the United States will not read the full citations that support our arguments, but they are included in the texts provided to the Court and to opposing counsel. Further, I wish to note that the United States reserves the right to make additional arguments regarding issues of jurisdiction or the merits of this case that are not made today for purposes of this proceeding. Our presentation will proceed as follows. Ms Catherine Brown, the Department of State's Assistant Legal Adviser for Consular Affairs, will discuss the nature of the consular function and the practice of States with regard to consular notification and the remedies when notification is not provided. She will also describe in some detail the underlying facts of Mr. Breard's case and the efforts of the United States once it became aware of the case.

1.14. Ms Brown will be followed by Mr. John Crook, the State Department's Assistant Legal Adviser for United Nations Affairs. Mr. Crook will discuss the legal factors that should guide the Court in determining whether it should indicate provisional measures and will apply those factors to this case to show that provisional measures are not warranted. In doing so, he will discuss the text of the Vienna Convention, it negotiating history, and relevant subsequent practice.

1.15. Mr. Matheson, the State Department's Principal Deputy Legal Adviser and Co-Agent in this case, will address additional, prudential reasons for the Court not to issue provisional measures in this case, by noting the problems that would be created were the Court to assume the role asked by Paraguay.

1.16. After Mr. Matheson's presentation, I will return to the podium to provide a brief closing. Thank you, Mr. President. I ask you now to invite Ms Brown to the podium.

The VICE-PRESIDENT: Thank you Mr. Andrews. I give the floor now to Ms Catherine Brown.

Ms BROWN: Mr. President, Members of the Court,

2.1. It is a privilege and honor to be appearing before this Court for the first time.

2.2. My task is to explain to the Court the factual background of this dispute. I will review how the United States has responded to the concerns expressed by the Government of Paraguay, including the results of our investigation into the facts of Mr. Breard's case. First, however, I will address the nature of the consular function and the practice of States with regard to consular notification, in so far as those facts are relevant to the issues of this case.

I. The Consular Function

2.3. The principal function of consular officers is to provide services and assistance to their country's nationals abroad. The Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties, enumerates a wide range of general consular functions in Article 5. Article 36 addresses the specific issue of consular officers communicating with their nationals abroad.

2.4. Article 36, paragraph 1 *(a)*, provides that consular officials shall be free to communicate with their nationals and to have access to them. This case does not involve a deliberate interference with Paraguay's right to communicate with its national, Angel Breard. Moreover, since Paraguayan consular

officials became aware of Mr. Breard's detention, they have been able to communicate and visit with him.

2.5. Article 36, paragraph 1 *(b)*, provides that a detained foreign national shall be permitted without delay to communicate with the relevant consular post and that competent authorities will advise the consular post of the foreign national's detention without delay if the detainee so requests. There is no serious question in this case that Mr. Breard could at any time have communicated with a Paraguayan consular official, either directly or through his family or his attorneys, had he known and chosen to do so.

2.6. Article 36, paragraph 1 *(b)*, concludes with the "consular notification" obligation that is at issue in this case: it provides that "the said authorities shall inform the person concerned without delay of his rights under this paragraph". Virginia authorities apparently did not so advise Mr. Breard, at the time of his arrest, or at any time prior to his conviction and sentence, that he could communicate with a consular official. But that does not mean that he was impeded or dissuaded from obtaining consular assistance. He, or his family, or his attorneys, might at any time have enlisted the assistance of a consul, as is frequently the case. The option of calling one's embassy or consul for help is widely known, and many governments advise their own nationals to call their embassy or consul in an emergency abroad.

2.7. Article 36, paragraph 1 *(c)*, provides that consular officials may visit their nationals in detention, converse and correspond with them, and arrange for their legal representation. Again, there was no deliberate effort to interfere with this right, and since becoming aware of Mr. Breard's detention Paraguayan consular officials have been able to visit and communicate with him. With respect to legal representation, arrangements were made by the State of Virginia for two clearly competent lawyers to represent Mr. Breard. Thus a consul proved unnecessary to perform this function.

2.8. Finally, Article 36, paragraph 1 *(c)*, concludes that a consular officer shall refrain from taking action on behalf of a national who is in prison if he expressly opposes such action. This provision is of particular interest here because Mr. Breard did not accept — indeed he adamantly resisted and even rejected — the advice not only of his attorneys, but also of his mother a Paraguayan national.

2.9. Several additional points are noteworthy. First, neither Article 5 nor Article 36 imposes any obligations on consular officers themselves. A consular officer may or may not choose to undertake any particular function on behalf of his countrymen. Consequently, the practice of States — and even of individual consuls — in assisting their nationals varies widely. Some countries are very active, while others are passive or even quite frankly uninterested or unable to provide any significant consular assistance. A country may have just one or two consular officials in a capital city, and none at a more remote location. A country's consular officials may make frequent prison visits or visit only selectively, if at all. Each country decides for itself what it will do. This in turn creates expectations among its nationals as to whether seeking consular assistance would be worthwhile.

2.10. Second, nothing in these Articles elevates the rights of foreign nationals above those of citizens of the host country. A foreign national is expected to obey the host country's laws, and is subject to its criminal justice system. Consular officers assist their nationals within this context. Consistent with this, Article 5 *(i)* of the Vienna Convention limits the rights of consular officers to represent or to arrange representation of their nationals before the tribunals of the receiving State. They may do so only "subject to the practices and procedures obtaining in the receiving State". The United States does not permit foreign consular officials to act as attorneys in the United States, nor may its own consular officers abroad act as attorneys for American citizens. We believe that this is the general practice of States.

2.11. Third, the Vienna Convention does not make consular assistance an essential element of the host country's criminal justice system. This is inevitable, given that consular officers have no obligations to act in any particular way vis-à-vis a host country's criminal justice system. A consul may do nothing at all, leaving the justice system to run its course. Or, the consul may visit the detainee; may ensure that the detainee's family is aware of the detention; may assist the detainee in securing counsel, if necessary; and may follow developments so that any questions about the fairness of the proceedings can, if appropriate, be discussed with host country officials. But the consular officer is not responsible for the defence

because he cannot act as an attorney.

II. State Practice With Respect to Consular Notification

2.12. Two additional aspects of state practice are relevant: how faithfully do governments provide notification and what remedies, if any, are provided by governments for failures to notify? Because it is important that the United States respond appropriately to allegations of violations of consular notification, the Department of State recently made inquiries to all of our Embassies and, through them, directly to governments on these matters. While our information remains incomplete, we believe that it fairly reflects the range of state practice.

2.13. Practice with respect to notification: Compliance with respect to the obligation to notify the detainee of the right to see a consul in fact varies widely. At one end of the spectrum, some countries seem to comply unfailingly. At the other end, a small number seem not to comply at all. Rates of compliance seem partly to be a function of such factors as whether a country is large or small, whether it has a unitary or federal organization, the sophistication of its internal communication systems, and the way in which the country has chosen to implement the obligation. Countries have chosen to implement the obligation in different ways, including by providing only oral guidance, by issuing internal directives, and by enacting implementing legislation. Some apparently provide no guidance at all.

2.14. If a detainee requests consular notification or communication, actual notification to a consul may take some time. It may be provided by telephone, but sometimes a letter or a diplomatic note is sent. As a result there may be a significant delay before notification is received and, consequently, critical events in a criminal proceeding may have already occurred before a consul is aware of the detention. And, as noted previously, the consul may then respond in a variety of ways. For these reasons, and because of the wide variation in compliance with the consular notification requirement, it is quite likely that few, if any, states would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems.

2.15. Practice with respect to remedies: Let me turn now to what our inquiries revealed about state practice with respect to remedies. Typically when a consular officer learns of a failure of notification, a diplomatic communication is sent protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the involved law enforcement officials. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance. We are not aware of any practice of attempting to ascertain whether the failure of notification prejudiced the foreign national in criminal proceedings. This lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national.

2.16. Notwithstanding this practice, Paraguay asks that the entire judicial process of the State of Virginia — Mr. Breard's trial, his sentence, and all of the subsequent appeals, which I will review momentarily — be set aside and that he be restored to the position he was in at the time of his arrest because of the failure of notification. Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified *one* that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification.

2.17. In the United States today, foreign nationals and the Government of Paraguay are attempting to have our courts recognize such a remedy as a matter of United States domestic law. But if our courts do so, the United States will become, as far as we are aware, the first country in the world to permit such a result. A number of foreign ministries have advised us that this result would certainly or most likely not be possible in their countries.

2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a

detainee of the right of consular notification automatically required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and inquire into the resources then available to Paraguay's consular officers. Surely governments did not intend that such questions become a matter of inquiry in the courts.

III. The United States Response To The Failure of Notification

2.19. Against this background, I would now like to advise the court of the steps taken by the United States relating to this case in an effort to be responsive to Paraguay's concerns.

2.20. The United States received official notice of Mr. Breard's case in April 1996 through a diplomatic note from Paraguay's Embassy in Washington. Significantly, the note did not allege a breach of the Article 36 consular notification obligation. It did not request consultations to discuss the case. It did not ask for any United States government intervention other than to facilitate efforts to obtain information from Virginia, which the Department of State did. The Department later learned, from Mr. Breard's attorneys, that those attorneys were attempting to challenge Mr. Breard's conviction based on an apparent failure of consular notification and litigation brought by Mr. Breard.

2.21. In September 1996, Paraguay filed suit against Virginia in a federal trial court. The suit sought to restore the *status quo ante* for Mr. Breard on the theory that only such action could vindicate Paraguay's governmental rights in consular notification.

The Department of State discussed the case with representatives of Paraguay in October 1996 and later received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Mr. Breard. That request failed to provide any evidence that consular law or practice would require such a result. Nevertheless, United States officials met with counsel for Paraguay about the matter and gave the issues raised by the suit careful consideration. Ultimately, the United States concluded that Paraguay's remedy for the consular notification failure lay in diplomatic communications with the Department of State. The United States so advised both the court in which Paraguay's case was pending and Paraguay's Ambassador. The United States did not object to Mr. Breard's own efforts to raise the consular notification issues in the courts, but neither did it support them.

2.22. On 3 June 1997, the Department received another letter from the Ambassador. I note that this letter is not referenced in Paraguay's Application to this Court. In it the Ambassador advised that Paraguay thought that the dispute should be resolved in the domestic courts of the United States, and not by this Court, but that Paraguay nevertheless would agree with the United States to come to this Court. This proposal was conditioned: the domestic United States proceedings should be stayed and the United States should waive any jurisdictional objections it might have to the jurisdiction of this Court and the United States should agree to require Virginia to accept this Court's decision. Like Paraguay's previous correspondence, this letter again failed to offer any serious explanation of why the remedy Paraguay was seeking was appropriate.

2.23. The Department of State nevertheless then decided to undertake an investigation into the case. In our investigation, we received the full co-operation of Virginia and we reviewed all facts relevant to the consular notification issue. This included the critical portions of the transcript, including Mr. Breard's testimony and an affidavit from his defence lawyers concerning their efforts on his behalf.

2.24. Through this process, we learned the following relevant facts:

(1) Mr. Breard unquestionably committed the offences for which he was tried. He was arrested while attempting a rape. Genetic and other physical evidence linked him to the earlier murder and attempted rape of Ruth Dickie. Ample evidence existed to prove that Mr. Breard committed these crimes, entirely independently of his own testimony. Indeed, nothing in Paraguay's submission suggests that Mr. Breard did not commit the crimes for which he was sentenced. Paraguay instead suggests that a consular officer might have persuaded Mr. Breard to make different tactical decisions;

(2) Mr. Breard had almost immediate and thereafter continuing contact with his family. He testified that one of the first phone calls he made at the time of his arrest was to his uncle. His mother and a cousin were involved in his defence, and his mother testified at his trial. Contacting family members is normally one of the first and most important things that a consular officer does when a national is detained, but here consular assistance to accomplish this proved unnecessary;

(3) Mr. Breard first came to the United States 1986 and thus had been resident in the United States for about six years at the time of his arrest. He had been married briefly to an American. This made it difficult to accept Paraguay's contention that Mr. Breard did not understand American culture;

(4) Mr. Breard had a good command of English. His lawyers had no difficulty communicating with him in English. He testified at his trial in English and the transcript of his testimony attests to his command of the language. Mr. Breard told the judge that he had no problems with English and was comfortable speaking it. Moreover, the state would have provided an interpreter had one been needed. Thus, Paraguay's implication that Mr. Breard was tried unfairly in a language he did not understand is demonstrably false. While a consular officer might help interpret for a detained foreign national, such assistance was not needed by Mr. Breard;

(5) Mr. Breard was represented by two criminal defence lawyers experienced in death penalty litigation. They spent at least 400 hours — the equivalent of 50 days — on his case. United States courts subsequently concluded that their legal representation met the requirements of the United States Constitution for the effective assistance of counsel. These attorneys worked closely with Mr. Breard, his mother, a female cousin, and his religious counsellor from jail, who was of Bolivian origin, to prepare his defence. They communicated with Mr. Breard's personal friends to find witnesses who could testify on his behalf. They communicated with persons in Paraguay to find evidence that would assist in his defence. They arranged for the court to appoint three experts to examine Mr. Breard's mental competence, and they obtained his medical records from Paraguay and from Argentina, so as to explore fully the possibility of an insanity defence and to develop mitigation evidence. Paraguay's assertion that it could have paid for witnesses from Paraguay appears irrelevant, because both his mother and cousin came from Paraguay to assist and there is no indication that there were other witnesses who were not used because of financial constraints;

(6) Mr. Breard decided to plead "not guilty" and to testify in both the penalty and sentencing phases of his trial contrary to the advice of his legal counsel and his mother — a strategy that was clearly unwise. This is the principal tactical decision Paraguay asserts it could have changed, but it is clear that Mr. Breard was advised against it by his own lawyers and his mother, yet rejected their advice. He was fully apprised of the risks of his strategy in the context of the American legal system. Access to a consular officer, who would have been less familiar with that system than his own lawyers, would not have made Mr. Breard's tactical decisions more informed;

(7) there is no credible evidence that Mr. Breard's decision to plead "not guilty" and testify was founded on a cultural misunderstanding. He was born and lived his early years in

Argentina, he went to Paraguay for his secondary education and then he came to the United States to study English. As noted, he had been in the United States for six years and married to an American briefly. Significantly, as noted, his mother was also Paraguayan and yet she as a Paraguayan understood the error of his judgment well enough to advise him not to do what he did. And again, finally, his lawyers unequivocally explained to him that his strategy would not work. He signed a statement confirming that he was rejecting their advice and was not afraid of the outcome even if it resulted in a sentence of death;

(8) although Mr. Breard's legal counsel apparently thought that Breard had the opportunity to plead guilty in exchange for a life sentence, at best only very general preliminary discussions were held on this matter and they were never seriously pursued. Virginia officials have advised us that no actual offer of a plea agreement was ever made and that none would have been made, because of the strength of the government's case and the aggravated circumstances of the crime. Virginia would not affirmatively have agreed to a life sentence because under Virginia law a life sentence would have permitted Mr. Breard's future release. Thus Paraguay's assumption that Mr. Breard could have avoided the death penalty through a plea bargain does not withstand scrutiny;

(9) objective evidence indicates that the jury and the judge could easily have decided on the death penalty even if Mr. Breard had not testified. There was evidence that the murder was "aggravated" within the meaning of Virginia law, both by the "vileness" of the particular circumstances surrounding it and by the continuing danger that Mr. Breard posed to the community. This evidence supported imposition of the death penalty under Virginia law and the judge, who had to approve the jury's recommendation, would have known that a life sentence meant the possibility of future release;

(10) finally, Mr. Breard had the full protection of the criminal justice system. In addition to competent court appointed counsel, he had full judicial review. His conviction and sentence were reviewed and sustained by the Virginia trial court and the Virginia Supreme Court, and subsequently by a federal district court and a federal appeals court. The consular notification issue was being raised only after these procedures had been completed, in yet two more entirely separate legal proceedings.

2.25. In July 1997, the Department reported the results of its investigation in a letter to the Ambassador. That also is not referred to in Paraguay's Application to this Court. Because it found no evidence of consular notification or access, the Department expressed deep regret that such notification apparently was not provided to Mr. Breard. The Department advised, however, that there was no basis for concluding that consular assistance would have altered the outcome. It further stated that it saw no appropriate role for this Court.

2.26. Significantly, the Government of Paraguay has never responded to that letter, either to contest its factual assumptions or to address the Department's conclusion that consular notification would not have made a difference. Even so, the United States has continued to have periodic communications and discussions about the case with Paraguay. These discussions included assurances given as recently as February of this year by senior Paraguayan government officials that they recognized that this case was unprecedented and unlikely to succeed. On 30 March, however, Paraguay unexpectedly advised the United States that it would file this suit unless the United States engaged in consultations and stayed Mr. Breard's execution. Still prepared to address in diplomatic channels any issues relating to consular notification, the United States agreed to engage in such consultations. The United States did so even though it was unable to stay the execution — which is in the hands of the United States Supreme Court and the Governor of Virginia — and even though it continues to believe that this Court is not an appropriate forum to address Paraguay's concerns.

2.27. In addition to these specific measures relating to Mr. Breard's case, the United States has also intensified its long-standing efforts to ensure that all federal, state, and local law enforcement officials in the United States are aware of and comply with the consular notification and access requirements of Article 36. Guidance on these requirements has been issued regularly by the Department of State for

many years. Recently, however, the Department has issued a new and comprehensive guidance on this subject, along with a pocket-sized reference card for law enforcement officers to carry on the street. These materials have been personally provided by the Secretary of State to the United States Attorney-General and to the Governor of every state of the United States including, of course, Virginia. They have also been provided by the Department's Legal Adviser, Mr. Andrews, to every state Attorney-General, and they are being disseminated throughout the United States. In addition, the Departments of State and Justice have begun conducting briefings on these issues for state and federal prosecutors, and law enforcement officials, focusing particularly on areas with high concentrations of foreign nationals. Through these and other efforts, the United States is both acting to correct the circumstances that led to the failure of consular notification in Mr. Breard's case and acting in a manner consistent with state practice. Nothing more is required.

2.28. Mr. President, that concludes my factual presentation of the consular issues raised by this case. I thank the Court for its attention and invite it now to call upon Mr. Crook to speak.

The VICE-PRESIDENT: Thank you, Mrs. Brown. I call now on Mr. John Crook.

Mr. CROOK:

3.1. Mr. President, Members of the Court, it is again an honour and a pleasure for me to appear before you. My presentation will consider several important legal factors that should guide the Court in determining whether to indicate provisional measures in this case. I will show why, for a number of reasons, the Court should not indicate the measures requested by Paraguay.

I. The Significance of Provisional Measures

3.2. I must begin by underscoring the gravity and importance of the decision now before the Court. As the Court well understands, the indication of provisional measures is a matter of serious consequence. The decisions of this Court clearly show the need for caution before taking such action. This reflects, first of all, the impact on the authority and the responsibility of sovereign States that such measures may have. It also reflects the fact that such measures may be indicated only after hurried and incomplete proceedings, and that is particularly true here where the Court is sitting to hear a case that was filed less than 96 hours ago.

3.3. It is for such reasons that the Court and commentators have stressed the exceptional nature of the Court's provisional measures power. I refer the Court, for example, to its Order in the case concerning *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, (I.C.J. Reports 1976*, paras. 32 and 11) and, as Mr. Andrews indicated, the citations in all these matters are contained in the transcript we have handed to the Registry. Thoughtful opinions by individual Judges have examined the point in greater detail. I refer you to Judge Shahabuddeen's opinion in the case concerning *Passage Through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July, 1991, (I.C.J. Reports 1991*, p. 29); Judge Lachs in the *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, (I.C.J. Reports 1976*, p. 20); the dissenting opinions of Judges Winiarski and Badwi Pasha in the case concerning the *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July, 1951, (I.C.J. Reports 1951*, p. 97) where they observed that "[m]easures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State". Judge Lachs, I think, well summed up the consequences in his separate opinion in the *Aegean Sea* case: "the Court must take a restrictive view of its powers in dealing with a request for interim measures".

3.4. The basic factors guiding the Court's decision whether or not to use its exceptional power to indicate provisional measures are laid down in the Statute of the Court. Article 41 envisions that the Court will carry out two separate, although inter-related, examinations. In the interests of time, I shall

not read Article 41 but I would refer the Court to it, in particular Article 41(1).

3.5. As the Court will see, that text envisions two separate lines of enquiry. First, the Court's decision whether to indicate provisional measures is to be guided by an assessment of the overall context or circumstances of the case before it. Second, any measures to be indicated are of a nature"which ought to be taken to preserve the respective rights of either party". I shall consider each of these aspects in turn.

II. Provisional measures are not warranted in these circumstances

3.6. I shall begin by showing how provisional measures are not warranted in these circumstances. Now Article 41 shows that the Court can and should consider the totality of circumstances involved in a case in deciding whether the indication of provisional measures is appropriate. Other members of the United States team are treating some particularly relevant circumstances. The Agent of the United States, Mr. Andrews, briefly addressed issues relating to the timing of this case. He noted the prejudice, both to the United States and to the judicial process, that follows from the Applicant's decision to file its case at the time it chose to do so. Ms Brown described the facts underlying Paraguay's claim, showing how it departs from the realities of international consular practice. She also showed how the failure to inform Mr. Breard of his right to consular access had no bearing on his trial, conviction and sentence. In our next presentation, Mr. Matheson will analyse yet other relevant circumstances, particularly the implications of this case for other States and for the Court.

3.7. My own discussion will be focused on two interrelated aspects of Paraguay's legal claim. First, I will show how the Court does not have jurisdiction to provide the remedy that Paraguay seeks in its Application. Then I will show how, in assessing whether to indicate provisional measures which may substantially prejudice the party against which they are directed, the Court must weigh the nature of the legal claims before it. The Court should not exercise its exceptional power to indicate provisional measures that prejudice the target State, where the moving Party's claims are legally unfounded or are unlikely to prevail.

3.8. Now as I shall show, particularly given the drastic consequences of Paraguay's basic legal claim — that the lack of consular notification invalidates each and every subsequent conviction of any alien in any State party to the Vienna Convention on Consular Relations — that claim should not prevail. Neither the Convention's language, nor its history, nor State practice supports it.

*No **Jurisdiction**.*

3.9. Because of the fundamental flaws that undermine Paraguay's claim for relief, the Court has no jurisdictional basis for the measures now requested. Now admittedly, the showing of jurisdiction at the stage of preliminary measures is less substantial than is required at later stages of the case. As the Court recently summarised in its Application of the Genocide Convention Order

> "[O]n a request for provisional measures, the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant . . . appear, prima facie, to afford a basis on which jurisdiction of the Court might be established." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 11, para. 14.)

Although the burden of showing jurisdiction is lower now than it will be at later stages of this case, the Applicant still has a burden to meet. Paraguay has not met that burden.

3.10. Article I of the Optional Disputes Settlement Protocol to the Vienna Convention on Consular Relations gives the Court jurisdiction over disputes arising out of the "interpretation or application" of the Conventtion. However, there is no dispute here about either the interpretation or the application of the

Convention. The Parties do not disagree on what it means to "inform" a foreign national of his rights under Article 36, paragraph 1 *(b)*, of the Convention. Nor do they dispute that Mr. Breard was not so informed.

3.11. Instead, Paraguay's claim in this case, in essence, is that under the Vienna Convention the Court can void Mr. Breard's criminal conviction and sentence, and require that he be given a new trial. As I will show, the Vienna Convention does not provide for such an extraordinary form of relief. Paraguay may object to the appropriateness of a criminal conviction and sentence under United States law and practice, but this is not a dispute about the interpretation or application of the Vienna Convention.

3.12. Paraguay tries to meet this difficulty by invoking the doctrine of *restitutio in integrum* (Paraguay's Application, p. 11, para. 25). Paraguay cannot, however, create a right that does not otherwise exist under the Vienna Convention on Consular Relations — the Court's sole basis for jurisdiction in this case — simply by invoking a general principle of the law on reparation. Paraguay has failed to make a prima facie showing that the Court has jurisdiction to grant the exceptional relief it seeks here. Under the circumstances, under the Court's well-settled jurisprudence, there is no jurisdictional basis for the Court to indicate provisional measures.

3.13. In this respect, this situation is similar to that faced by the Court in the provisional measures phase of the *Lockerbie* case (case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Order, 14 April 1992,* Request for the Indication of Provisional Measures, para. 43) There, the Court found, as a prima facie matter, that there was no legal basis for the Libyan claim under the Montreal Convention because of the adoption of a resolution of the Security Council. The Court therefore rejected Libya's request for provisional measures because "the rights claimed . . . under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures". In a similar way here, there is no legal basis for the rights that are claimed by Paraguay. Those claims too are not an appropriate basis for the indication of provisional measures.

The Merits of Paraguay's Claim.

3.14. Obviously, the Court cannot consider the merits at this stage in a case that is 96 hours' old. Nevertheless, in addition to assessing whether it has jurisdiction to proceed, the Court must weigh the totality of circumstances bearing on Paraguay's request for preliminary measures. In so doing, the Court must consider the doubtful nature of the core legal proposition that Paraguay is advancing — that the Convention requires the invalidation of every conviction and sentence of any person who has not received consular notification required by the Convention.

3.15. The difficulties with Paraguay's legal position must be confronted at this stage, and this ought to be an important element in assessing the appropriateness of provisional measures. As Dumbauld wrote at the time of the Permanent Court, "if it is apparent that the applicant cannot succeed in his main action, preliminary relief will of course be denied" (Edward Dumbauld, *Interim Measures of Protection in International Controversies* 165 (1932).

A. Plain Meaning of the Text

3.16. What are the legal difficulties? To begin with, Paraguay's claim conflicts with the plain meaning of the text. Absolutely nothing in the language of Article 36, paragraph 1, of the Vienna Convention on Consular Relations (or in any other Article of the Convention) offers support for Paraguay's claim that failure of consular notification requires invalidation of any subsequent conviction and sentence of an alien.

3.17. Paraguay's claims follow from Article 36, paragraph 1, of the Vienna Convention, to which both the United States and Paraguay are parties. Article 36 establishes the basic régime for consular assistance to nationals who may be detailed in the receiving State.

Article 36, paragraph 1, provides:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested . . . shall also be forwarded to the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

3.18. Mr. President, as was described by Ms Brown, when the competent federal authorities learned that Mr. Breard may not have been told when he was arrested that Paraguay's consul could be notified, the United States authorities investigated thoroughly. When they concluded that a violation of Article 36, paragraph 1, probably had occurred, they took action in co-operation with the Commonwealth of Virginia to try to prevent any recurrence. Senior United States officials apologized to Paraguay, and offered further consultations. As Ms Brown just noted, when Paraguay recently proposed that the two sides enter into formal consultations, the United States promptly agreed to that proposal. Unfortunately, however, and notwithstanding Article II of the Optional Disputes Settlement Protocol to the Convention, Paraguay chose to bring its action here instead.

3.19. Thus, there is no legal dispute between the United States and Paraguay regarding the need to give notification as provided for under Article 36, that such notification was not given, and concerning the need to take effective steps to prevent recurrence. The sole issue concerns the consequences under international law if an arrested alien is not told that his consul can be notified. The United States contends that the solution to such a breach of the treaty's requirements is to be pursued through normal processes of diplomatic apology, consultation and improved implementation.

3.20. Paraguay, however, asks this Court to impose much more drastic consequences. Paraguay's Application maintains that the necessary legal consequence for any such breach is that the ensuing conviction and sentence must be put aside. There is absolutely no support for this claim in the language of the Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties.

3.21. Mr. President, there are very few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international tribunal for possible reversal of a conviction or sentence. I have in mind here, for example, regional instruments and institutions such as the European Convention on Human Rights and the Strasbourg Court. Where States have elected to create such mechanisms, they have done so expressly and with great precision. They have not created such additional remedies by indirection or implication, as Paraguay asks the Court do here. Let me return to the negotiating history.

B. Negotiating History

3.22. Likewise, there is no support for Paraguay's claim there. We know of nothing in the history — and Paraguay has pointed to nothing — even hinting that the Parties intended failure to comply with Article 36, paragraph 1, to invalidate subsequent criminal proceedings.

3.23. The Vienna Convention was negotiated on the basis of draft articles prepared by the International

Law Commission. The relevant ILC proposals do not contain the obligation to inform an arrested person, that their consul could be notified. That was added at the Conference. We have found nothing in the debates of the conference supporting Paraguay's claim, but there are a number of indications to the contrary.

3.24. Article 36 was negotiated with great difficulty at the Vienna Conference. The final version was only agreed upon two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls if a national was arrested. A large number of other States strongly opposed this requirement. They argued, among other things, that it would impose an excessive administrative burden on the receiving State and that the national might not want his government authorities to know about his arrest. (Luke T. Lee, *Consular Law and Practice* (1990), pp. 138-139.)

3.25. Ultimately, a compromise had to be reached. The compromise involved a series of amendments to the ILC draft. I will not try to trace all of these for you, but I will mention one because it helps to show that States at the Conference clearly did not intend that failure of consular notification would invalidate subsequent legal proceedings. The negotiations began with the ILC draft providing for consular notification in the case of arrest. That was widely criticized as unreasonably burdensome and impractical. Accordingly, various narrowing amendments were offered by groups of countries.

3.26. One, offered by Egypt and accepted by the Conference, changed the initial language to state that the obligation to inform the sending State only arises if the national so requests. The delegate of Egypt explained his amendment as follows:

> "The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State.*" (Twentieth Plenary Meeting on 20 April, 1963, United Nations Conference on Consular Relations, Official Records, p. 82, at para 62. Emphasis added.)

The explanation of this amendment (which was adopted by the Conference) clearly suggests that the Conference saw the normal processes of diplomatic adjustment as the means to address failure of a notification requirement. The Conference did not foresee that defects of consular notification would result in the invalidation of subsequent criminal proceedings. Had the parties thought so, the many States that already expressed fears about the burden of the notification requirement would surely have voted down the text that is before you today.

3.27. Other statements during the Conference reinforce that the Parties did not intend the Convention to alter the operation of domestic criminal proceedings. The delegate from the USSR stated that "the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope for the codification of consular law" (*ibid.*, p. 40, para. 3). The delegate from Belarus expressed similar views, noting that "the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States" (*ibid.*, p. 40, para. 8). Such statements directly conflict with Paraguay's claim today. Thus, the negotiating history does not support Paraguay's broad view of the consequences of non-compliance with Article 36, and a variety of statements made during the debate support a contrary view.

C. State Practice

3.28. Likewise, there is no support in state practice for Paraguay's position. As Ms Brown explained, after the Breard case initially came to the attention of the United States federal authorities, the United States Department of State surveyed the practice of the States parties to the Vienna Convention. That survey found no State — none — that adopted the position Paraguay urges on the Court here. Paraguay has referred to no such State practice here.

3.29. The few national court cases that we know have considered the matter have not reached the result urged by Paraguay. Lee's treatise *Consular Law and Practice* cites an Italian case where the Italian authorities failed to provide the required consular notice to Yater, a British national. According to Lee, the challenge to Yater's conviction was rejected.

> "The Supreme Court *(Cassazione)* held that the consular role in assisting the defence of his fellow nationals under the Vienna Convention on Consular Relations is of 'a complementary and subsidiary nature, and does not replace the right of the accused to make his own arrangements for his own defence'. Since Yater in this case had adequately defended himself during proceedings through a lawyer chosen by him, the plea was dismissed." (Luke Lee, *Consular Law and Practice* p. 150-151, citing *Cassazione*, 19 Feb. 1973, *re Yater*. Summary and Commentary in 2 *Italian Yb. Int'l L.* 336-9 (1976).)

The issue also has been energetically litigated in United States courts. Indeed, Mr. Donovan, the distinguished counsel for Paraguay, has been a prominent participant in litigation in the United States urging that this approach be adopted as a matter of United States domestic law. However, no United States court has found that the failure of consular notification, standing alone, constitutes a sufficient basis for invalidating a sentence and conviction.

D. No Injury to Mr. Breard

3.30. Finally, as Ms Brown has explained, the notion that Mr. Breard suffered injury because of any failure of consular notification is speculative and unpersuasive. Paraguay's Application asks this Court to indicate provisional measures largely on the basis of some bold assumptions about what Paraguay's consul might have done. In doing so, the Application presents an inflated and unrealistic description of a consul's functions in criminal matters. A consul is not a defence attorney. Consular protection does not immunize a national from local criminal jurisdiction. What a consul can do is help arrested persons arrange means for their own defence. A consul can notify an arrested person's family, or help to ensure that the defendant has local defence attorneys. A consul does not typically retain lawyers to defend her nationals; the United States does not do so, and Paraguay has not established that it normally does so either.

3.31. But, as we have shown, Mr. Breard was able to accomplish all these things quite effectively without the assistance of Paraguay's counsel without the assistance of Paraguay's consul. He spoke English and had lived in the United States since 1986. After his arrest, he was in regular contact with his family. He was defended by able attorneys throughout his trial and the many subsequent legal proceedings. A consul could not have done more to enhance the effectiveness of Mr. Breard's legal defence.

E. Conclusion

3.32. For all of these reasons — the lack of any textual basis in the Convention, the lack of support in the negotiating history and State practice, and the absence of injury to Mr. Breard — Paraguay's basic claim in these proceedings lacks legal foundation. Because there is no basis for the remedy Paraguay seeks in the Convention, the Court lacks jurisdiction. The weakness of Paraguay's legal claim is also a compelling reason for declining to indicate provisional measures.

III. Provisional Measures and The Rights of the Parties

3.33. Mr. President, my final section, will be relatively brief. I will first address the role of provisional measures in relation to the protection of the rights of the Parties. I will explain why such measures should not be indicated in a form that would create a selective or unjust balance with regard to the Parties. I will then show how, in deciding whether to indicate particular provisional measures, the Court must consider whether those measures improperly prejudge the outcome of the dispute.

3.34. Mr. President, the provisional measures sought by Paraguay amount to a determination on the merits of this case. If the measures sought by Paraguay are indicated and implemented, Paraguay will have won, at least for a period of however many years may be required for the Court to arrive with its final judgment. Paraguay will have advanced its key objective through a hurried and unbalanced proceeding that cannot adequately address the serious legal issues that are at stake.

3.35. This cannot be reconciled with the régime for provisional measures envisioned under Article 41 of the Statute. Article 41 says that the Court may indicate, where circumstances require, "any provisional measures which ought to be taken to preserve the respective rights of either party". Take note: "the respective rights of either party". Provisional measures should not protect the rights of one party, while disregarding the rights of the other. But that is precisely what is requested here. As Paraguay has made clear, its goal here is to prevent the operation of the criminal laws of the Commonwealth of Virginia. It seeks to do so where there is no doubt that the accused committed very grave and violent offences, and where there have already been five years of extensive appellate litigation in national courts. As Mr. Matheson will elaborate in our next presentation, this would significantly impair the rights of the United States to the orderly and conclusive functioning of its criminal justice system.

3.36. Moreover, provisional measures should not be indicated in terms or in circumstances where they constitute a disguised adjudication on the merits. Professor Rosenne makes this point strongly in his remarkable new treatise:

> "The power to indicate provisional measures cannot be invoked if its effect would be to grant to the applicant an interim judgment in favour of all or part of the claim formulated in the document instituting proceedings." (Shabtai Rosenne, *The Law And Practice of the International Court, 1920-1996*. Vol. III, p. 1456.)

Nevertheless, this is precisely what Paraguay seeks. Paraguay is asking this Court for a concealed adjudication on the merits of this case through the guise of provisional measures.

3.37. This is exactly the type of case Judge Oda warned of in his recent essay on provisional measures. As he wrote:

> "In recent cases, the actual matters to be considered during the merits phase have been made the object of the requested provisional measures . . . [T]he applicant States appear to have aimed at obtained interim judgments that would have affirmed their own rights and preshaped the main case." (Oda, "Provisional Measures. The Practice of the International Court of Justice," *in Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, Lowe and Fitzmauice, eds., p. 553.)

3.38. Judge Oda goes on to warns of the implications of this, and of the possibility that:

> "the Court . . . be tempted to deliver an interim judgment under the name of provisional measures . . . If the tendency is to be for the Court to arrive at a quick decision on matters relating to the merits, while reserving for the future other much more judicious consideration on the question of jurisdiction as well as the merits . . ., then the whole matter requires very careful consideration." (*Ibid.*, p. 554.)

3.39. Mr. President, Judge Oda is right to be concerned, this whole matter does require very careful consideration. Provisional measures should not be used as a vehicle for a hasty and legally unjustified decision on the merits of Paraguay's claim. And thus, for all of the reasons I have indicated — because of the lack of jurisdiction, because Paraguay's claim is unsound in law, and because the requested provisional measures are unbalanced and improperly prejudge the merits, the Court should reject Paraguay's request.

3.40. I thank the Court for its attention during a long presentation. I now ask that it Invite Mr. Michael Matheson, Principal Deputy Legal Adviser, to present the next section of our argument.

The VICE-PRESIDENT: Thank you Mr. Crook. Mr. Matheson has the floor.

Mr. MATHESON:

4.1. Mr. President, distinguished Members of the Court, it is once again my great honour and privilege to appear before you on behalf of the United States. Mr. Crook has explained the basis for our contention that the provisional measures sought by Paraguay are not within the jurisdiction of the Court and lack any legal foundation. I will now explain the reasons for our view that the granting of the provisional measures sought by Paraguay would be contrary to the interests of the parties to the Vienna Convention on Consular Relations, the international community as a whole, and the Court as well.

4.2. Article 41 of the Statute of the Court provides in part that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken . . .". This language clearly indicates that the Court may or may not choose to exercise this power in a particular case, depending on whether it believes the circumstances require it and whether it believes the particular measures proposed ought to be taken. (See, for example, *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976*, separate opinion of President Jiménez de Aréchaga, p. 16.)

4.3. It follows from this that the Court should only grant provisional measures where it is satisfied that this would not only be fair and beneficial to the parties to the immediate dispute, but also would be consistent with the proper role of the Court, the interests of the Parties to the convention in question, and the good of the general international community.

4.4. In the present case, Paraguay has asked the Court to suspend decisions of the criminal courts of a State. To our knowledge, this is the first occasion on which the Court has been asked to do so. In its request for provisional measures, Paraguay has asked the Court, in a matter of a few days, to scrutinize and suspend for an indefinite period the considered decisions of the trial and appellate courts of Virginia and the United States — decisions that have been taken after extensive judicial proceedings over a period of years.

4.5. This would be a very serious step, and one which could threaten serious disruption of the criminal justice systems of the parties to the Vienna Convention, and of the work of this Court as well.

4.6. There are currently over 160 parties to the Vienna Convention, of which over 50 have adhered to the Optional Protocol on Compulsory Settlement of Disputes. The Parties to the Protocol include a number of populous States, such as France, Germany, India, Japan, the United Kingdom and the United States, where very large numbers of foreign nationals have immigrated or travelled for various reasons. It is inevitable that a significant number of crimes will occur in any population group of such a size, and in fact this has occurred. It is also to be expected that in a number of these cases, law enforcement authorities may commit, or be alleged to have committed, errors in the process of consular notification called for under the Vienna Convention.

4.7. The question is not whether such errors should be remedied. Rather, it is whether this should be left to the diplomatic process and to the domestic criminal authorities of the State in question, or whether this Court should assume the role of a supreme court of criminal appeals to deal with such cases by staying, reviewing and reversing domestic court decisions. Once the Court opens itself to this process, it can be expected that a great many defendants will press the States of their nationality to take recourse to it. This would include not only those who received no consular notification at all, but also those who may wish to claim that the notification received was deficient, incomplete, or tardy. It would include not only those who were genuinely prejudiced by the failure of consular notification, but also those who suffered little or no prejudice because they were nonetheless accorded full assistance of competent

counsel and all the requirements of due process.

4.8. In principle, if such a remedy were available for violations of the Vienna Convention, why would it not also be available for alleged violations of other conventions when committed against foreign nationals in detention for criminal offenses, such as bilateral treaties with provisions for consular protection, the International Covenant on Civil and Political Rights, or other agreements with provisions concerning rights to be accorded to aliens or to any person accused of criminal offences? If States may ask this Court to stay executions and nullify convictions on the basis of violations of the Vienna Convention, would they not feel able to do so under these other agreements as well?

4.9. It is difficult to believe that the parties to these conventions really intended that this Court serve as a supreme court of criminal appeals in this manner. It is difficult to believe that they intended to subject their domestic criminal proceedings, which typically include both trial proceedings and one or more levels of appellate review, to yet another stage of review by an international tribunal. As Mr. Crook demonstrated, we know this was not the case with respect to the Vienna Convention. We also know that such a role was not contemplated by the framers of the United Nations Charter and the Statute of the Court.

4.10. Yet this is precisely the message that the Court would give in granting the provisional measures sought by Paraguay in the present case. Delay of the execution of Mr. Breard until the Court's final disposition of the case, as Paraguay requests, would in practice mean the suspension of domestic criminal proceedings for years, whatever the final outcome. Many other defendants in many States could be expected to demand the same treatment, whether the alleged violations were serious or minor, and whether or not those violations led to any significant failures of due process in their conviction.

4.11. In other words, the indefinite stay of execution requested by Paraguay would not be a minor measure that simply preserves the status quo. It would be a major and unprecedented intrusion by the Court into the domestic criminal process that could have far-reaching and serious effects on the administration of justice in many States, and on the role and functioning of the Court.

4.12. All States have compelling interests in the orderly administration and finality of their criminal justice systems, particularly with respect to heinous crimes of the type committed by Mr. Breard. All States have compelling interests in avoiding external judicial intervention that would interfere with the execution of a sentence that has been affirmed following an orderly judicial process meeting all relevant human rights standards.

4.13. We submit that the Court should not take a step having such potentially far-reaching consequences on the basis of a few days of hurried consideration of a suit filed at the very last moment. Before taking any action to intrude into the criminal process of a State, the Court should require Paraguay to show that it does indeed have a basis for its claim in accordance with the normal, orderly process of full proceedings under Part III of the Rules of Court. In this connection, the Court should go through the process called for by Article 63 of the Statute of the Court, which calls for notification of all States parties to the Vienna Convention so as to afford them the possibility of intervention or other submission of views to protect their own vital interests in the interpretation and application of the Convention.

4.14. Given these compelling reasons for refraining from the provisional measures sought, has Paraguay identified any basis for justifying such an extraordinary remedy? We maintain that this is not the case, since Paraguay has shown nothing to indicate that consular notification would have changed the result of the Breard case.

4.15. Neither Mr. Breard's guilt nor the heinous nature of his crime is at issue; he freely confessed in open court that he had committed the offence. In any case, his guilt was thoroughly established by compelling material evidence. Paraguay has not taken issue with this in its Application or in its argument this morning. There is no question of the execution of an innocent man.

4.16. Nor is there any evidence that Mr. Breard was prejudiced in any way by the apparent lack of consular notification. He had lived in the United States for six years and spoke English well. He

understood the proceedings being conducted and participated actively in his own defence. He had full contact with his family and with persons in Paraguay. He had competent counsel well versed in the criminal law of Virginia. He was directly and strongly advised by his attorneys to refrain from the incriminating testimony which he insisted on giving. His conviction was reviewed and upheld by appellate courts of the United States and Virginia.

4.17. Paraguay's contention that the involvement of Paraguayan consular officials would have changed all this is nothing more than imaginative, but wholly unsubstantiated, and implausible speculation. The Court should not engage in an unprecedented intervention in the domestic criminal proceedings of a State on the basis of such implausible speculation. What a domestic appellate court would not do, this Court *a fortiori* should not do. This Court should not serve as a supreme court of criminal appeals in derogation of the normal operation of domestic criminal courts.

4.18. On the other hand, we fully recognize that Paraguay has a legitimate interest in ensuring that the provisions of the Vienna Convention are properly observed and that there is not arecurrence of the apparent failure of consular notification in the Breard case. Therefore, as Ms Brown described, the United States has taken extensive measures to ensure future compliance by State and local authorities.

4.19. Further, when Paraguay requested bilateral consultations under the Convention, the United States promptly agreed to consultations on all issues raised by the Breard case. We were specifically ready to discuss the possible procedural steps provided for in Articles II and III of the Protocol concerning conciliation and arbitration. However, Paraguay insisted on an immediate stay of execution as a precondition to refraining from immediate recourse to this Court, which the United States was not in a position to grant. The United States nonetheless remains prepared to engage in bilateral consultations aimed at encouraging more effective implementation of this Convention by both Parties.

4.20. Mr. President, for all these reasons, we believe that the granting of provisional measures sought by Paraguay would have serious negative consequences for the Parties to the Vienna Convention, for the Court, and for the international community as a whole. We urge the Court not to take such a step, and certainly not after only a few days to consider the implications of such an action. We therefore encourage and urge the Court to exercise its power to deny the measures requested by Paraguay.

4.21. Once again, I thank the Court for its attention and consideration of these arguments. I now suggest that the Court recognize the Agent of the United States, Mr. Andrews, to conclude the argument of the United States and to present its Final Submission. Thank you Sir.

The VICE-PRESIDENT: Thank you Mr. Matheson. I call on Mr. Andrews, Agent of the United States.

Mr. ANDREWS:

5.1. Mr. President, this morning the Court asked the Government of Paraguay to provide copies of two letters, one dated 10 December 1996 and one dated 3 June 1997. We would be pleased to provide the unanswered 7 July 1997 letter that the State Department sent to the Government of Paraguay, which was referenced by Ms Brown in her presentation. Mr. President and Members of the Court, this concludes the presentation of the United States. The submission of the United States is as follows: "That the Court reject the request of the Government of Paraguay for the indication of provisional measures of protection, and not to indicate any such measures".

5.2. We thank the Court for its kind attention to our presentations and its consideration of our arguments.

The VICE-PRESIDENT: Thank you Mr. Andrews. Both Parties have now concluded the first round of their oral pleadings. The Court will adjourn now and resume at 3.00 p.m. to afford both Parties an opportunity to reflect. The Court stands adjourned until 3.00 p.m.

The Court rose at 12.50 p.m.

Uncorrected

Non-corrigé

CR 98/8

International Court of Justice

THE HAGUE

YEAR 1998

Public sitting

held on Tuesday 7 April 1998, at 3 p.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the case concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America)

Request for the Indication of Provisional Measures

VERBATIM RECORD

Cour internationale de Justice

LA HAYE

ANNEE 1998

Audience publique

tenue le mardi 7 avril 1998, à 15 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président, faisant fonction de président

en l'affaire de l'Application de la convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique)

Demande en indication de mesures conservatoires

COMPTE RENDU

0143

Present:	Vice-President	Weeramantry, Acting President	*Présents :*	M.	Weeramantry, vice-président, faisant fonction de président en l'affaire
	President	Schwebel		M.	Schwebel, president
	Judges	Oda		MM.	Oda
		Bedjaoui			Bedjaoui
		Guillaume			Guillaume
		Ranjeva			Ranjeva
		Herczegh			Herczegh
		Shi			Shi
		Fleischhauer			Fleischhauer
		Koroma			Koroma
		Vereshchetin			Vereshchetin
		Higgins		Mme	Higgins
		Parra-Aranguren		MM.	Parra-Aranguren
		Kooijmans			Kooijmans
		Rezek			Rezek,
	Registrar,	Valencia-Ospina		M.	Valencia-Ospina, greffier

The Government of the Republic of Paraguay is represented by:

H. E. Mr. Manuel María Cáceres, Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands, Brussels,

as Agent;

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Barton Legum, Debevoise & Plimpton, New York,

Mr. Don Malone, Debevoise & Plimpton, New York,

Mr. José Emilio Gorostiaga, Professor of Law at the University of Paraguay in Asunción and Legal Counsel to the Office of the President of Paraguay,

as Counsel and Advocates.

Le Gouvernement de la République du Paraguay est représenté par:

S. Exc. M. Manuel María Cáceres, ambassadeur du Paraguay au Royaume de Belgique et au Royaume des Pays-Bas, à Bruxelles,

comme agent;

M. Donald Francis Donovan, membre du cabinet Debevoise et Plimpton, New York,

M. Barton Legum, membre du cabinet Debevoise et Plimpton, New York,

M. Don Malone, membre du cabinet Debevoise et Plimpton, New York,

M. José Emilio Gorostiaga, professeur de droit à l'Université du Paraguay à Asunción et conseiller juridique de la Présidence du Paraguay,

comme conseils et avocats.

The Government of the United States of America is represented by:

Mr. David R. Andrews, Legal Adviser, United States Department of State,

as Agent;

Mr. Michael J. Matheson, Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, United States Department of State

Ms. Catherine Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State

as Counsel and Advocates;

Mr. Sean D. Murphy, Legal Counsellor, United States Embassy, The Hague,

Mr. Robert J. Ericson, United States Department of Justice,

as Counsel.

Le Gouvernement des Etats-Unis d'Amérique est représenté par:

M. David R. Andrews, conseiller juridique du département d'Etat des Etats-Unis,

comme agent;

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat des Etats-Unis,

comme coagent;

M. John R. Crook, conseiller juridique adjoint chargé des questions concernant les Nations Unies au département d'Etat des Etats-Unis,

Mme Catherine Brown, conseiller juridique adjoint chargé des affaires consulaires au département d'Etat des Etats-Unis,

comme conseils et avocats;

M. Sean D. Murphy, conseiller juridique à l'ambassade des Etats-Unis, La Haye,

M. Robert J. Ericson, du département de la justice des Etats-Unis,

comme conseils.

The VICE-PRESIDENT: Please be seated. The Court resumes its sessions to hear the second round of oral submissions and I give the floor now to His Excellency Mr. Cáceres of Paraguay.

Mr. CACERES: Thank you Mr. President. I would like to ask the Court to call upon Mr. Donovan to offer Paraguay's rebuttal. Thank you.

The VICE-PRESIDENT: Thank you. Mr. Donovan, please.

Mr. DONOVAN: Mr. President, Mr. Vice-President, distinguished Members of the Court.

It would be useful, I believe, to start this afternoon's session by summarizing where the Parties stand in light of this morning's submissions.

First, there is no dispute about the terms of the governing texts, Articles 5 and 36 of the Vienna Convention.

Second, there is no dispute on the basis of the United States submissions this morning that the duties owed under the Vienna Convention to Paraguay and to its national were not fulfilled by the competent authorities of the United States, and hence, that there was a violation of the Treaty. Third, there is no dispute about the generally applicable principle of restitution, that is that the author of an offending illegal act has the obligation to restore the prior situation.

Fourth, there is no dispute between the Parties that the object of provisional measures is to preserve the Parties' rights so that the Court will be in a position, upon rendering final judgment, to render an effective final judgment, a judgment that means something.

Fifth and perhaps most importantly, there is no dispute that unless this Court orders provisional measures, Mr. Breard, Paraguay's national, will be executed on Tuesday 14 April. In Paraguay's, view these points of agreement standing alone not only support an indication of provisional measures in accord with the Court's cases and governing Statute but compel one. Nevertheless, we would like to briefly address several of the other points made by the United States this morning.

First, with respect to jurisdiction. The United States appears to contest the Court's jurisdiction on two converse grounds. On the one hand, the United States argues, it is plain, indeed the United States concedes, that there was a violation here. While on the other hand, the United States argues, it is just as plain that the Vienna Convention affords no effective remedy for that violation. We of course agree that there was a violation, we of course disagree that there is no effective remedy but in any event, neither of these arguments can defeat the Court's jurisdiction in this case.

May I explain? There are at least two reasons why the United States concession that there was a violation here of Article 36 cannot deprive this Court of jurisdiction over the dispute. The first was well stated by the United States in its oral arguments before this Court in the Tehran hostages case. There the United States thought it prudent to address the argument, or the possible argument, that given that there was no possible legal justification for the actions by Iran of which the United States complained in that case, there might not be a dispute between the Parties coming within the Optional Protocol. And if the Court will permit me, I would remind the Court that one of the treaties on which the United States founded its claims in that case was the Vienna Convention on Consular Relations and one of the bases of jurisdiction was indeed the Optional Protocol on which Paraguay founded this case.

The United States described that argument, or any such argument, as specious. It said "the sum and substance of every case brought to the Court under the compromissory clause of a treaty is the claim that the Respondent's conduct violates its obligations under that treaty". It would be anomalous to hold that the Court has jurisdiction where there is an arguable claim that a treaty has been violated but lacks jurisdiction where there is a manifestly well-founded claim that the same treaty has been violated. Such a contention has no support in the jurisprudence or traditions of this Court or in the terms of the Optional Protocols. I continue to quote "indeed any such role would provide an incentive for States to flout their treaty obligations and to avoid offering any justification for their conduct in order to defeat the Court's jurisdiction". I would respectively suggest that the same reasoning applies here. A State party should not be permitted to divest the Court of jurisdiction by in effect confessing error, by in effect stating yes indeed our obligations were not complied with, we agree with the relevant obligation and therefore there is no dispute for all the reasons well stated by the United States in its earlier submissions.

The second reason that the concession of a violation cannot deprive this Court of jurisdiction is that, as this very case amply demonstrates, disputes about the "interpretation and application" of the Convention may well arise from disagreements about the consequences that should flow from a given violation. It may well be in this case that the Parties would be able to reach a stipulation with respect to the relevance of events and indeed perhaps reach a stipulation as to the underlying act or omission that brings the Parties to this Court and then move to a remedies phase or phase that would address the consequences that flow from those events. But that does not change the fact that there is a dispute here as to the interpretation and application of the treaty. Indeed I would suggest that the United States own arguments

this morning suggest that there is very much a disagreement on the subject of what consequences should flow from the omission that is not in issue.

The United States appears to have made two additional points with respect to jurisdiction that I would also like to address.

First, in at least one formulation this morning, the United States suggested that there was no jurisdiction because Paraguay had no legally cognizable claim. We disagree with that statement of course, with respect to Paraguay's claim but I note for the moment that it would in any event not afford a basis for denying jurisdiction; it is an argument properly addressed to the merits of the claim.

Second, the United States referred to Articles II and III of the Optional Protocol. I simply want to note that this Court of course may claim again in the *Tehran* hostages case, both in the provisional measures Order and in its final Judgment, that those Articles do not in any way affect the compulsory jurisdiction of this Court under Article I.

I would like now to address several of the circumstances that the United States suggested are relevant to Paraguay's Application.

First, the United States suggested that somehow Paraguay should be penalized for having filed its Application this past Friday, in light of the impending execution on 14 April.

This Court, I believe, will appreciate the magnitude of a decision by a Government like that of Paraguay to institute proceedings in the International Court of Justice against the United States. Needless to say, that is not a decision that is taken lightly. As we explained this morning, even last week there were discussions between the Parties as to ways to avoid the filing that was finally made late in the day on Friday.

As the United States itself advised the Court, those discussions foundered when it became clear that the United States was not prepared to take steps to halt the impending execution pending further discussions between the Parties, or pending some alternative means of dispute resolution. I add parenthetically that that is another reason of course why any recourse to Articles II and III was not available at this point, but of course an indication of provisional measures, and the continuance of this proceeding, will in no way make impossible further discussions on those topics. But for present purposes, if the Court were to now penalize Paraguay for its efforts to amicably resolve the dispute and to take all steps to avoid having to come to this Court, it would create what, we would respectfully suggest, would be an unwise different sentence to parties who wish to take every step to avoid a filing here, and for that reason we would respectfully suggest that that element should play no role in the Court's deliberations.

We would further suggest that it would be particularly inappropriate to allow any such circumstance to affect the Court's deliberations in this case.

As has been mentioned, Paraguay here went the extra mile to avoid coming to this Court. It took what we believe is a perfectly justifiable, but nonetheless unusual step, of filing a lawsuit first in the United States courts, asserting its own rights under the Vienna Convention, and seeking relief in the form of an injunction against further enforcement of the conviction and sentence of its national. It took the same position in that proceeding that it takes here, that is, it did not contest the authority of the Virginia officials to enforce its criminal law, and it did not contest the authority of the Virginia officials to re-try Mr. Breard if Paraguay received the relief it requested, if Virginia officials were so advised, which Paraguay fully expects they would be.

Because there has been some discussion of those proceedings, I would like to address two aspects of those proceedings in order to clarify the record before the Court.

First, there was a suggestion this morning that Paraguay at some point in those proceedings suggested that this case should not come before this Court, that the United States courts were the appropriate forum. I understand the United States is going to provide the Court with a June 3 diplomatic letter. We

are going to provide the Court as well with a letter that may shed some light on that exchange, which was a letter sent by Paraguay's counsel to counsel for the United States in the domestic litigation, which is of course the Department of Justice, in response to the position taken by the United States in the domestic litigation.

If the Court will permit me a moment.

In the initial proceeding in the district court, that is the federal trial court in the United States, the court held that Paraguay had standing to sue for breach of a treaty in the United States courts. It dismissed the suit, however, on an alternative jurisdictional ground that has to do with the constitutional structure of the United States, and the authority of a federal court to impose remedies against State officials. Paraguay appealed that decision.

In the court of appeals the United States filed a brief, *amicus curiae*, in which it urged the court of appeals not to rely on the ground relied upon by the district court, but instead to affirm on the alternative jurisdictional ground that a sovereign should not be permitted, that a suit by a sovereign in a court in the United States raises a non-justiciable controversy.

In the course of that brief, the United States took the position that in fact the proper form was diplomatic negotiations or this Court. At the same time, the United States suggested an argument that perhaps presaged the argument it makes here, that there would be no jurisdiction given that the Parties agreed on the obligations imposed by the Vienna Convention. In response to that position by the United States, Paraguay's counsel wrote a letter which we will happily provide to the Court, which stated what I have said this morning, that Paraguay had determined that it was appropriate to seek relief in the first instance from the municipal courts of the United States, had Paraguay been able to obtain effective relief, the Parties may never have come before this Court. Paraguay did not obtain that relief, but Paraguay has never suggested that the courts of the United States somehow by filing suit in the courts of the United States, it would somehow be foreclosed from its rights under the Optional Protocol, and the suggestion that the United States courts are in some way the appropriate forum is a bit difficult to understand in light of the position that the United States took in the domestic litigation that a sovereign, such as Paraguay, should not be permitted to sue for breach of treaty in those courts.

There is a second aspect of the United States litigation that I believe requires clarification after this morning's submissions.

The United States referred to some litigation in the United States, relatively recent litigation, arising from claims under the Vienna Convention in death penalty cases. No court in the United States has yet reached the merits of any such claim. I would like to briefly describe the two kinds of claims that have arisen, and perhaps give the Court some appreciation of the dilemma of a Government like Paraguay that seeks to vindicate its rights.

In the first instance there have been two cases by sovereigns. The first is that by Paraguay, and the second is a suit modelled on Paraguay's action that was filed by the United Mexican States in an attempt to halt the execution of one of its nationals. In both cases the district court dismissed on the constitutional immunity ground that I have just described, and in both cases the court of appeals affirmed on that ground. In other words, in neither case did the court reach the merits of the Vienna Convention claim. Indeed in the Paraguay lawsuit, in the lawsuit brought by the Government here, the Court emphasized the importance of the Vienna Convention, but simply held that it was disabled by the XIth Amendment to the United States Constitution from ordering the relief sought against State officials.

In the second category of cases are federal *habeas* claims by prisoners themselves seeking to attack their convictions on the basis of the Vienna Convention and a failure to provide the required notification. In all of those cases of which I am aware, and there are now probably three or four, the claim has not been raised until the prisoner has reached a federal court, on a *habeas* petition, that is, the claim was not raised in the proceedings in the state court, as in Mr. Breard's case, and was not raised in the state *habeas* proceedings. In that situation, the holdings are uniform, thus far, that the stringent limitations that both the United States Supreme Court has laid down and Congress has recently codified with respect to

habeas petitions generally, and death penalty *habeas* petitions in particular, bar the *habeas* petitioner from raising the claim. In other words, those courts too have not reached the merits, although I should note that in Mr. Breard's own case, again, oneof the judges on the panel — although he concurred in the judgment saying that the court could not provide relief — emphasized the importance of the rights at issue.

If you put the two cases involved with respect to Mr. Breard — that is Paraguay's case asserting its rights and Mr. Breard's case asserting his rights — together, the Court can appreciate the difficulty. The claim here arises from a failure to notify. Notwithstanding the discussion, the United States this morning with respect to what the Vienna Convention and what the various discussions were, it seems to me that there can be no dispute that an obligation in Article 36, paragraph 1 *(a)*, requiring the detaining State to advise the national of his right to consult consul, has a very obvious purpose, that is to ensure that that detainee is knowledgeable, becomes advised of his or her rights. And yet the combination of the holdings in Mr. Breard's case and in Paraguay's own suggest that, even in a case where the claim arises from failure to notify and the petitioner — the *habeas* petitioner, in one case — learns of the rights under the Vienna Convention only after he has gone through the proceeding in which he has been deprived of them, he is too late to raise them. Indeed, without going into the nuances of United States law, effectively the holding in Paraguay's own case, because of the peculiar limitations on federal courts' authority to provide relief, was to the same effect — that Paraguay because it was attacking or, in the understanding of the Court, attacking the judgment — was in effect too late because it would be undoing prior State action.

I do not mean to suggest that those cases are relevant to this Application. To my mind the only relevance here is that clearly Paraguay should not be penalized for some suggestion that it has delayed. Clearly there have been substantial efforts to resolve the dispute prior to reaching the Court.

There is, however, one more line of cases in the United States which may be relevant and that is, at least two courts have addressed the suggestion where the impact of a failure to notify under the Vienna Convention and the possible impact that might have on the enforcement of a conviction. We would be happy to provide the Court with a copy of the case that I am about to refer to, but it is a case from the United States Court of Appeals for the Ninth Circuit — this is one of the federal courts of appeals — and that case considered federal regulations that require federal officials, immigration officials, to advise an alien detainee of his or her rights under the Vienna Convention. The regulations are explicitly intended to implement the Vienna Convention, the obligations. The federal court to which I refer did set aside a conviction for illegal entry after deportation as a result of the immigration authority's failure to comply with this regulation. The court reversed the conviction on the ground that the underlying order of deportation was invalid because the arresting authorities had failed to notify the defendant at the time of his initial detention of his right to contact a consular official. The court went further to determine that prejudice was present and it therefore afforded the relief. It built on, by the way, an earlier case from the same court of appeals. In short, there is authority in the United States that, in fact, a failure to comply with the Vienna Convention obligations can have an effect on the validity of a conviction obtained in the tainted proceedings and I shall return to that point in a few moments when talking about the United States submissions on the merits.

I would like to address now the United States suggestion that there is no legally cognizable claim in so far as it might be relevant not to jurisdiction but to the circumstances forming the Court's decision whether to grant provisional measures.

I should start by noting that whatever the weight of this factor in another case, it is hard to see how it could weigh against provisional measures here where there appears to be agreement on the failure to comply with the underlying obligations and the dispute is very much about the consequences that should flow. It would seem to me that the Court should exercise serious caution in deciding in the face of a conceded violation — that the applicant State does not bring a sufficiently weighty case to warrant provisional measures. I would think that that caution would apply particularly where the suggestion of the United States that there is no remedy, and hence no legally cognizable claim, appears to contradict so squarely the fundamental principle as to the remedy of restitution, the applicability of that remedy in the event of an internationally wrongful act and the substance of that remedy, that is, to restore the situation

that existed prior to the wrongful act. Given that the United States position is so squarely inconsistent with that basic understanding, I would think the Court would want to exercise extreme caution before reaching a decision that somehow the Vienna Convention was intended as an exception to that principle.

In any event, however, we believe that the United States submission does not hold up even on its own terms.

First, the United States argument is essentially that the Court should conclude that Paraguay is not entitled to the remedy it seeks because one looks in vain, in Article 36 or elsewhere in the Vienna Convention, or even in the legislative history, for confirmation that that remedy is available. With all due respect, we would suggest that the United States is engaged on a misguided search. One need not find the remedy in the text of the Convention. If the United States argument were accepted, it would be necessary to reproduce the Articles on State Responsibility in every treaty and surely that is not the expectation of treaty drafters. Instead, the fundamental understanding with respect to remedies is part of a legal context in which any treaty must operate and therefore the fact that one does not find an explicit confirmation of the remedy Paraguay seeks in either the Optional Protocol or the Vienna Convention itself, should certainly not lead to the conclusion that that remedy is not available. Indeed, this Court would have to reverse or repudiate a long line of authorities because it has never imposed a requirement in considering whether particular remedy was available that that remedy appear in the given international instrument on which the claim was founded. Again, if one would recall the eminently justifiable range of remedies this Court provided in the *Tehran* hostages case one would have a hard time finding explicit confirmation for each of those remedies in the underlying instrument. In effect, the United States argument here, their reading of the Vienna Convention, will effectively limit this Court to grants of declaratory relief without the power to order a remedy. That role is plainly inconsistent with the understanding of parties who both adhere to an international treaty and subscribe to a dispute resolution protocol. It is intrinsic to the notion of a violation, as *Chorzów* itself suggests, that consequences flow from that violation.

Again, however, even on the United States own terms, even if one were looking to the Vienna Convention itself, there would not be the support that the United States finds.

First, with respect to Professor Lee's treatise. The case to which the United States referred, although it is only a brief account in the treatise, by no means suggests that a remedy is not available. Indeed, the Court actually went to the issue, or it appears from the brief account in Lee,and decided that the applicant could not show prejudice. From the brief account in Lee it appears that that case actually supports Paraguay's argument that a remedy is available, even if it may affect the validity of the underlying conviction. Lee then follows the discussion of the Italian case, with a discussion of the two cases from the United States that I have just described which indeed do draw consequences as to the validity of an underlying conviction from a failure to notify under Article 36. To the extent that it is relevant now — and I will address that issue in a moment — the weight of Lee's treatise suggests that Paraguay is entitled to its remedies.

Likewise with respect to the negotiating history, the United States points to certain sections of that drafting history to support a contention that the parties did not intend the Convention to alter the operation of domestic criminal proceedings. Yet the history on which the United States bases its argument support an opposite conclusion. In particular, the United States referred, but not by name, to statements by Mr. Kostov, a delegate of the Soviet Union and Mr. Avakov, a delegate of Belorussia, and presented those statements as supporting the view that the Convention did not intend to alter the effect or have any effect on domestic criminal proceedings. In fact, Mr. Kostov argued further that paragraph 2 of Article 36 as then drafted, and as ultimately adopted by the Convention, was an attempt to interfere with the internal affairs of States by hampering the administration of justice in regard to aliens, and that that version would make it difficult for States to exercise their sovereign right to prosecute aliens who broke the law. Mr. Kostov and Mr. Avakov spoke in support of restoring the ILC's draft of paragraph 1 of Article 36 *(b)*. Mr. Evans, a delegate of the United Kingdom, characterizes the Soviet proposal as follows: according to Mr. Evans, it would have meant that the laws and regulations of the receiving State would govern the rights specified in paragraph 1 provided that they did not render those rights completely inoperative. In the event, however, the Conference chose to eject the proposed Soviet

amendment. Thus, so far as we understand the statements, the legislative history on which the United States relies, was in support of an alternative to the provision in the Vienna Convention which would have deluded the effect of that Convention specifically with respect to its possible effect on criminal proceedings. Thus the legislative history supports the notion that the Convention in appropriate instances might even subordinate municipal criminal procedures to the provisions of Article 36, paragraph 1.

The United States has also suggested that it would be unwise for this Court to grant Paraguay the remedies it seeks because that would somehow open the floodgates to claims like that brought by Paraguay.

We would respectfully submit that, in the first instance, that the fact that others might have the same right that Paraguay might have should not deter the Court from recognizing that right in Paraguay; that would be fundamentally inconsistent with the judicial role. But in any event we do not believe that there is any basis for the scare the United States raises. Contrary to the characterization of the United States, Paraguay's Application is not an appeal to this Court and the question before this Court is not whether, in every criminal proceeding involving a foreign national, a violation of the Vienna Convention requires a new trial. Paraguay's action is not an appeal, it does not ask the Court to review or reverse any judgment of a municipal court, it does not ask the Court to review the proceedings in that court or to review the judgments of that court. Further, the question is not what remedy would be required in every criminal proceeding everywhere in the world, the question is what can Paraguay show with respect to this proceeding and on the basis of that showing, what relief would it be entitled to. The facts relevant to that enquiry are quite discreet and to the extent that, as the United States suggested this morning, it would require a consul to bring on evidence with respect of practices of the like, if a court found that relevant, the foreign sovereign could certainly make a decision when it sought the relief whether or not it wished to do so.

Finally, as this case demonstrates, cases of this kind would prompt a sovereign to come to this Court only with the greatest reluctance and even on the terms of the United States own argument, we do not think there is any basis for the concern.

Finally, the United States suggests that Paraguay's Application would require this Court to anticipate a judgment and would in fact anticipate a judgment in favour of Paraguay. That suggestion is belied by the very disciplined and narrowly tailored relief that we request. But before addressing the relief Paraguay requests, I would like to examine the United States' submissions in the light of the concern that the United States itself raises, that is that an indication of provisional measures here might anticipate a judgment. The United States comes to this Court and asks the Court to reject Paraguay's Application on the basis of the facts that it says it will be able to prove, on the basis of a survey of State practice, of which we were advised this morning, and on the basis of a showing on the legal rights at issue that I have just addressed. Clearly the Parties disagree about certain aspects of the consequences of this behaviour. If the Court would arrest a denial of the request for provisional measures on an assumption that the United States will be able to prove its facts and Paraguay will not, that indeed would anticipate a judgment. Equally, the extent of the informal survey of State practice might be relevant to the eventual determination of this Court, surely the Court should not make a decision on the basis of the advice provided over this lectern as to an informal survey conducted by the United States Department of State. That too would surely anticipate the proof, and hence the judgment, that would be elicited at the merits phase. And finally the United States asked this Court to reject Paraguay's claim on the basis that it has no legally cognizable claim. Again, while we disagree with that suggestion and while we believe the suggestion is not supported even by the authorities that the United States cites, nothing would so surely anticipate a judgment by this Court than a conclusion that notwithstanding the violation in this case, the remedy Paraguay seeks is not available.

Conversely, Paraguay asks for provisional measures that are extremely narrow. The only thing in effect that Paraguay asks this Court to do at this time is to order that the United States ensure that Mr. Breard is not executed while this case is before the Court. We would welcome the views of other States parties that might intervene, we are certain that they would enlighten the Court and we would fully expect the Court to take into account any other State that were motivated enough to join these proceedings. But surely before receiving those views, the Court should ensure that the case stays before this Court, that

the case remains in its full dimension. As I stated this morning, Mr. Breard, even if this Court grants the interim relief, will remain in Virginia's custody. If the United States prevails on the merits on this case Virginia will be able to schedule a new execution date and put him to death. Surely the United States does not mean to suggest that the delay in executing the sentence of death overrides Paraguay's interest in the life of its national to the extent that the Court would wish to balance in any way the effect of these interim measures on the two Parties, or in any way to protect against a decision here, either granting or denying the provisional measures Paraguay seeks in a manner that anticipates its judgment. It plainly, Paraguay respectfully submits, must grant the narrowly tailored measures Paraguay seeks.

I very much appreciate the Court's courtesy this afternoon.

The VICE-PRESIDENT: Thank you very much Mr. Donovan. Before you conclude the President would like to address a question to you.

The PRESIDENT: Mr. Donovan, you referred to two United States cases which did overturn earlier decisions on the grounds of failure to comply with the Vienna Convention on Consular Relations, if I understood you correctly. Did those decisions overturning the earlier judgments lead to retrials on the original charges or simply in dismissal of the original charges.

Mr. DONOVAN: I do not know the subsequent history of those cases. I do not believe that there is anything in those cases which would suggest that a retrial would not be possible and certainly, as I have said, it is not Paraguay's position here that a retrial would be barred. But I cannot definitively answer the Court's question, but I would be happy to do so when we provide those cases subsequently.

The PRESIDENT: Thank you very much.

The VICE-PRESIDENT: May I ask what is the earliest time you could furnish an answer to that question.

Mr. DONOVAN: This afternoon, that is in so far as it is disclosed by the published accounts of those opinions.

The VICE-PRESIDENT: Thank you Mr. Donovan. That concludes the second round of oral pleading of Paraguay and we will have a short adjournment to enable the United States to make its submissions.

The Court adjourned from 3.50 to 4.20 p.m.

The VICE-PRESIDENT: Please be seated. We meet now to hear the second round of oral submissions of the United States, and I give the floor to Mr. Andrews, Legal Adviser to the United States Department

of State.

Mr. ANDREWS: Mr. President, I would like to call to the podium Mr. John Crook to respond on behalf of the United States.

The VICE-PRESIDENT: Mr. Crook, please.

Mr. CROOK: Thank you Mr. President. Members of the Court.

In our final presentation this afternoon we will make, I believe, six points, attempting to bring together and respond to a number of the considerations that distinguished counsel for Paraguay introduced in his rebuttal. I shall try not to be too long.

My first point is this, that it seems to me that throughout this case, and certainly in the rebuttal we have just heard from Paraguay, there has been a signal of voidance of the burden of proof that the Applicant here must bear. They have in fact proved very little, if anything. Now Mr. Donovan in his presentation this afternoon tried to make up some of the deficiencies by seeking to build upon the evidence and argumentation that we gave you this morning. As to his arguments, I would simply invite the Court to consider the sources and determine in its own mind whether our reading of them, or Mr Donovan's reading of them, is the better. But it does seem to me that it is an anomalous position; a peculiar situation where the burden of the Applicant's proof is that the Respondent did not disprove the Applicant's assertions to the satisfaction of the Applicant. I would certainly disagree with that characterisation, but it does seem to me unsound in relation to the burdens that the Applicant here must bear.

There is one key issue here that I think we should take note of and it is an issue to which counsel for Paraguay did not refer, and that is the key issue of whether in fact consular access in this case would have made any difference. Counsel for Paraguay ignored that point in his summation, and it seems to me that it is an important point and is one that cannot be ignored, because all of Paraguay's case here rests on the factual premise, the assumption, the belief, that things would have been different had a Paraguayan consul been involved. For all the reasons that we suggested, the reasons that Ms Brown suggested, that seems to us to be not the case, that the burden here is on the Applicant, the burden has not been met.

My second basic point Mr. President, is that the Applicant here seems to me have responded to large parts of the United States submission by ignoring them or trivializing them. They ignored Ms Brown's long, and I think very informative description, of the realities of consular practice. Paraguay had nothing to say about that this afternoon. In large measure they ignored the indications that we brought to you regarding the realities of how States interpret and imply their obligations under the Vienna Convention on Consular Relations. They ignored altogether the circumstances of Mr. Breard's trial, defences for which he was charged, the adequacy of his counsel, the extensive nature of the appellate remedies that he pursued. They ignored large parts of the United States submission.

My third major point, Mr. President, is that it seems to me that the presentation here by distinguished counsel for Paraguay showed an undue preoccupation with the domestic litigation in the United States in which matters similar to these are being addressed. Counsel for Paraguay indicated that in his view, those cases were not relevant. We would agree, and we therefore will not seek here to re-argue them. I do wish here though to respond particularly to the cases that were raised at the last minute, and that were the occasion of the question from President Schwebel. The Applicant will presumably make those available to the Court, and the Court can inspect them and come to its own judgment regarding their implications. Our recollection is that the cases that the Court has requested were immigration cases involving deportation orders, and not criminal cases. That is our recollection, and we suffer from not

having the text with us, but it is our belief that they turned not on the Vienna Convention on Consular Relations obligations as such, but on the fact that the immigration service had failed to follow its own regulations, calling for consular notification. Under federal law, federal agencies are required to follow their regulations, and that was the basis for the courts' decision on those cases. That is our recollection, if we have mischaracterized them, the Court will soon have the opinions and will be able to see, but that is our understanding of what was involved in those cases.

My fourth point is that it seems to me that the Applicants in this case have ignored — have dealt with significant parts of the United States presentation this morning by ignoring it — or in any case by trivializing the implications. We spent a good deal of time here going through the implications of the course of action that is advocated by Paraguay, for example, for other governments, the other parties to the Vienna Convention on Consular Relations.

Counsel for Paraguay responded to that essentially by trivializing the point, saying we have one case and one case only here, and that's all the Court need concern itself about. With respect, Mr. President, that seems to me not to be good enough. With respect to the concerns of the United States, again, counsel for Paraguay minimized or trivialized the consequences of the remedy that they seek here, but again I think in all fairness, that is not good enough. The United States has significant interest in the orderly and authoritative administration of its criminal law, certainly in a case where the murder took place in 1992, the trial took place in 1993, and there appears to be no guilt, no dispute between the parties as to the guilt of the accused.

I think the same observation holds true as well concerning our points regarding the implications of the remedy sought by Paraguay for the Court. The concern is a real one, the implications for other countries and other situations are real, they cannot be ignored. That brings me closer to my final points, Mr. President.

The fifth point is the rather basic question. Is there a remedy? And the associated question, is there jurisdiction here? For the reasons that I indicated, it seems to me that the Court must consider the likelihood of Paraguay being able to show that the remedy that underlies their whole case exists and is available to them within the four corners of the Vienna Convention on Consular Relations. It is not appropriate for me here to re-argue the points I made this morning but I simply invite the Court to consider them. The point that there is no support in the text, the point that there is no support in the history, the point that there is no support in practice. I think it is a fair gloss on that, that Paraguay is quite unlikely to be able to show that the remedy it seeks either is available, or in any case, is to be found within the sphere of the Vienna Convention on Consular Relations which of course is the requirement for there to be jurisdiction. We are at something of a disadvantage because Paraguay, as the Applicant, has never really made the case. We have sought to respond, Paraguay has then tried to make its case by dealing with our response and we are left in this very unsatisfactory situation, Mr. President, that the basic burden of the Applicant has not been met. I think I would agree here with distinguished counsel for Paraguay who, in his presentation this afternoon, used words to the effect — and I freely admit that this is a paraphrase and not a quote; I hope this is a fair paraphrase — that to find the remedy, you must go beyond the text of the treaty, that is the problem, Mr. President, there is no jurisdiction. The Applicants seem unlikely to prevail on the merits.

Let me turn to my sixth and final point, Mr. President, and that is the reference to the *Hostages* case. Now, there was I think perhaps a misunderstanding of our position and I want to deal with it, because I think it is important. It is not our contention here that the Court is divested of jurisdiction by reason of the fact that we have confessed error and admitted that Mr. Breard was not given consular notification, that is not our point at all. Our point is the much broader one, that I have just discussed, that the remedy that is sought here is a remedy that goes far beyond the scope of the Vienna Convention and far beyond the scope of the jurisdiction of the Court.

Let me respond to other points regarding the *Hostages* case. It does seem to me that it is — unseemly is perhaps too strong a word — but it is not quite right to draw upon the *Hostages* case as the precedent for action by this Court here. The *Hostages* case involved a much more aggravated situation, the continued detention of a large number of hostages in conditions of apparent danger, in violation of fundamental

rules for the protection of diplomats and consuls. It was a profound, potentially very dangerous, disruption of international relations and it seems to me that it perhaps trivializes that case to analogize it to a situation where the Applicant is seeking not to deal with matters of great consequence at stake in the *Hostages* case, but rather to disrupt the operations of the criminal courts of a party to the Statute of this Court. It seems to me the analogy is not appropriate and it is not one that should illuminate the deliberations of this Court. Mr. President, I apologize that these remarks have been somewhat disjointed, the circumstances are a bit difficult, but I hope they have been of some use in clarifying our position. As always my delegation appreciates the courtesy of the Court in listening to our presentation. You have heard already the submission of the United States Agent and it is only for me to thank the Court.

The VICE-PRESIDENT: Thank you Mr. Crook. This brings us to the end of these oral hearings. I would like to express on behalf of the Court its warm thanks to the Agents, counsel and advocates of the Parties for the quality of their arguments and the courtesy and co-operation they have shown. In accordance with the usual practice, may I ask the Agents to remain at the disposal of the Court for any further information which it might need and, subject to that, I now declare closed the oral hearings on the request for the indication of provisional measures in the case concerning the *Application of the Vienna Convention on Consular Relations (Paraguay* v. *the United States)*. The Court will now withdraw to deliberate. The Order containing the decision of the Court will be read at a public sitting to be held on Thursday 9 April. There being no other matters before it today, the Court will now rise.

The Court rose at 4.35 p.m.